120 (1)

Supreme Court, U.S.
FILED

No. 08-1323 APR 24 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SOPHIA LORRAINE DAIRE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Second District Court Of Appeal For The State Of California

PETITION FOR A WRIT OF CERTIORARI

MICHAEL ROMANO
Counsel of Record
STANFORD LAW SCHOOL
CRIMINAL DEFENSE CLINIC
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-1900

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a jury instruction violate the Due Process Clause if it permits a juror to infer guilt of burglary from the existence of certain facts, such as mere possession of recently stolen property, without making clear that the juror need *not* draw such an inference?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
RELEVANT CONSTITUTIONAL, STATUTORY, AND JURY INSTRUCTION PROVISIONS	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The Decision Below Implicates an Irreconcilable Conflict Among Federal and State Courts	11
A. United States Supreme Court Doctrine	11
B. Many State Supreme Courts Have Upheld Inference Instructions that Lack Qualifying Language	14
C. Other Jurisdictions Have Rejected Similar Jury Instructions	16
D. Other Jurisdictions Reject Altogether the Use of Permissive Inference Jury Instructions in Recently Stolen Property Cases	21

TABLE OF CONTENTS – Continued

Page

E. Courts Upholding Permissive Inference Instructions Have Relied on Qualifying Language in the Instructions 22

F. Academic Commentators Have Highlighted the Due Process Concerns Raised By Permissive Inference Instructions 24

II. California's Model Jury Instruction on Recently Stolen Property Violates Due Process 24

III. The Question Presented Significantly Impacts the Administration of Criminal Justice Because Burglary is a Pervasive Crime 26

IV. This Case is an Excellent Vehicle for Considering the Question Presented 27

CONCLUSION 30

APPENDIX A, Opinion and Order of the Court of Appeal of California ..... App. 1

APPENDIX B, Order of the Supreme Court of California Denying Review ..... App. 27

TABLE OF AUTHORITIES

Page

CASES

Abel v. State, 333 N.E.2d 848 (Ind. Ct. App. 1975) 17

Arthur v. State, 86 N.E.2d 698 (Ind. 1949) 17

Barnes v. United States, 412 U.S. 837 (1973) ..... *passim*

County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140 (1979) 13, 14, 26

Crawford v. State, 550 N.E.2d 759 (Ind. 1990) 16, 17

Dedrick v. State, 2 N.E.2d 409 (Ind. 1936) 17

Dobson v. Commonwealth, 521 S.E.2d 569 (Va. 2000) 23

Francis v. Franklin, 471 U.S. 307 (1985) 12, 13, 14, 22

Harper v. State, 355 So.2d 314 (Miss. 1978) 17, 18

Pendergrast v. United States, 416 F.2d 776 (D.C. Cir. 1969) 23

People v. Anderson, 61 Cal. Rptr. 3d 903 (Ct. App. 2007) 25

People v. McClendon, 533 P.2d 923 (Colo. 1975) 15

People v. McFarland, 376 P.2d 449 (Cal. 1962) 14, 15, 25

People v. O'Dell, 64 Cal. Rptr. 3d 116 (Ct. App. 2007) 15

People v. Solorzano, 63 Cal. Rptr. 3d 659 (Ct. App. 2007) 15

TABLE OF AUTHORITIES – Continued

Page

People v. Williams, 94 Cal. Rptr. 2d 727 (Ct. App. 2000) 25

People v. Yeoman, 72 P.3d 1166 (Cal. 2003) 25

Phillips v. State, 377 N.E.2d 666 (Ind. Ct. App. 1979) 17

Sandstrom v. Montana, 442 U.S. 510 (1979) 12, 13, 14, 22, 25

Sansom v. State, 366 N.E.2d 1171 (Ind. 1977) 17

State v. Cooper, 306 S.E.2d 598 (S.C. 1983) 19, 20

State v. Lewis, 242 N.W.2d 711 (Iowa 1976) 15

State v. Ponthier, 449 P.2d 364 (Idaho 1969) 15

State v. Searle, 339 So.2d 1194 (La. 1976) 30

Tot v. United States, 319 U.S. 463 (1943) 11

Underwood v. State, 367 N.E.2d 4 (Ind. Ct. App. 1977) 16, 17

United States v. Beltran-Garcia, 179 F.3d 1200 (9th Cir. 1999) 22

United States v. Cota-Meza, 367 F.3d 1218 (10th Cir. 2004) 15

United States v. Ferro, 709 F.2d 294 (5th Cir. 1983) 22

United States v. Jennewein, 590 F.2d 191 (6th Cir. 1978) 16

United States v. Murphy, 703 F.2d 1335 (5th Cir. 1983) 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Parker, 32 F.3d 395 (8th Cir. 1994) 22

United States v. Rubio-Villareal, 967 F.2d 294 (9th Cir. 1992) 13, 20, 21, 26

United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975) 23

Vaughn v. State, 19 N.E.2d 239 (Ind. 1939) 17

Wells v. People, 592 P.2d 1321 (Colo. 1979) 18, 19

STATUTES

CAL. PENAL CODE § 459 (West 2009) 8, 9

CAL. PENAL CODE § 460 (West 2009) 9

OTHER AUTHORITIES

Charles Collier, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 STAN. L. REV. 423 (1986) 24

Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979) 24

FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES, 2007 tbl. 1 (2008) 26

ILLINOIS SUPREME COURT COMMITTEE ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL § 13.34 (4th ed. 2008) 22

TABLE OF AUTHORITIES – Continued

Page

JUDICIAL COUNCIL OF CALIFORNIA, CRIMINAL JURY INSTRUCTIONS (CALCRIM) § 376 (2008) ..... *passim*

Peter D. Bewley, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970) 24

STEPHEN E. FORESTELL & WAYNE A. LOGAN, 10 MINNESOTA PRACTICE SERIES § 16.48 cmt. (5th ed. 2008) 21

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sophia Lorraine Daire respectfully petitions for a writ of certiorari to the Second District Court of Appeal for the State of California in *People v. Daire*, No. B201976.

OPINIONS BELOW

The judgment of the Second District Court of Appeal for the State of California is unpublished and attached as Appendix A to this petition. The California Supreme Court's order denying review of that decision is unpublished and is attached as Appendix B to this petition.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Second District Court of Appeal for the State of California was entered on November 19, 2008. A petition for review to exhaust state remedies was timely filed with the Supreme Court for the State of California, which was denied on January 28, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL, STATUTORY, AND JURY INSTRUCTION PROVISIONS

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> *No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .*

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> *[N]or shall any state deprive any person of life, liberty, or property, without due process of law.*

California Criminal Jury Instruction (CALCRIM) No. 376 provides:

> *If you conclude that the defendant knew [] she[] possessed property and you conclude that the property had in fact been recently [] stolen[], you may not convict the defendant of [Burglary] based on those facts alone. However, if you also find that supporting evidence tends to prove [] her[] guilt, then you may conclude that the evidence is sufficient to prove [] she[] committed [Burglary]. The supporting evidence need only be slight and need not be enough by itself to prove guilt.*

INTRODUCTION

This case raises an issue that goes to the heart of our Constitution's protection of the accused against

conviction except upon proof beyond a reasonable doubt: whether an instruction permitting a jury to infer guilt of burglary from the existence of certain facts, without clarifying in some way that it need not draw such an inference, shifts the burden of proof in violation of the Due Process Clause. The appeals court for the second district of California held that one such California instruction, which permits jurors to infer guilt of burglary from the possession of recently stolen property and "slight" supporting evidence, comports with due process. State and federal courts are deeply fractured over the question.

STATEMENT OF THE CASE

1. Petitioner Sophia Daire has been tried twice for the same residential burglary—one time with the jury instruction at issue in this Petition and one time without the defective instruction. When the instruction was not read, the jury deadlocked. When the instruction was given, the jury convicted.

At Petitioner's first trial, the jury *was not instructed with* CALCRIM No. 376, which contains the improper inference at issue here; nor was the jury instructed with any other "permissive inference" jury instruction. At the second trial, the jury *was instructed with* CALCRIM No. 376. That jury found Petitioner guilty of first-degree burglary on evidence substantially similar to that presented in the first trial. CACLRIM No. 376 permits jurors to infer guilt

of burglary from the possession of recently stolen goods and "slight" supporting evidence, without cautioning that they are *not required* to draw such an inference.

The prosecution's case at both trials was based on the following circumstantial evidence: Between 10:00 and 11:00 a.m. on the morning of August 9, 2006, a man named Ronald Ryals (hereinafter "Ryals") observed from his bedroom window a person dismount from a silver bicycle across the street, touch a window screen on an apartment building, and then climb through the window into the apartment. Ryals could not see the person's face or determine his sex, age, height, or facial features, but he believed the person was a man of either Latino or African-American ethnicity with corn rows braided into his hair. The person was wearing a Miami Dolphins jersey featuring the number "50," "51," or "54."

Sometime within the next two hours (perhaps simultaneously) and either three or twelve blocks away (depending on whether one reads the transcript from the first or second trial), Deputy Sheriff Mike Fairbanks conducted a traffic stop of Petitioner for riding her bicycle on the sidewalk. Her hair was in an "Afro," a fact the deputy later noted in a police report by checking a box next to the word "Afro/Natural" (as opposed to "Braided/Dreadlocks"). Upon searching Petitioner, the deputy found several pieces of "mangled" costume jewelry, a placemat, and a shopping bag containing children's underwear, soap, body glitter, and other items. Petitioner was carrying

approximately $11 and no tools with which to cut a window screen.

Coincidentally, while driving through the neighborhood at the same time, Ryals noticed Petitioner being detained. Although reticent to approach the officer, Ryals did so after he was encouraged by a friend who was with him. Ryals and the officer then returned to the scene of the alleged crime, where they found a burglarized vacant apartment, which they determined belonged to Leporche Brumfield ("Brumfield"). Though police dusted the apartment for fingerprints, no usable prints were found.

Upon returning home, Brumfield identified the items recovered by the deputies, but also reported missing $200 and a disposable camera. She later reported missing several expensive bottles of perfume as well, which she valued at $300-$400. Despite the short time frame between the alleged burglary and the arrest, neither the $200 in cash nor the expensive perfume was found on Petitioner.

Petitioner—who recycles bottles, aluminum cans, and other materials for a living—testified to her recollection of the events of August 9. She stated that she was a resident of the neighborhood, and that she often searched for cans in the area surrounding Brumfield's apartment. In that area of Los Angeles, it is common to see people riding bicycles, wearing their hair in cornrows, and sifting through garbage cans. While searching for cans in the garbage bin outside Brumfield's apartment, Petitioner discovered

a relatively clean Miami Dolphins jersey. In need of a clean shirt, she put it on. She found several pieces of "mangled" jewelry in the dumpster, and she placed those pieces and some cans in a shopping bag that was sitting on the ground next to the dumpster. Petitioner never looked inside the shopping bag, and only later realized that it contained the miscellaneous items recovered by Deputy Fairbanks.

Petitioner's counsel argued in her closing argument that Brumfield's apartment had been burglarized before Petitioner arrived. A juror could reasonably believe, she argued, that as the burglar left the apartment, he disposed of the conspicuous jersey along with the less valuable items he had collected from inside the apartment, before fleeing with $200 and several bottles of expensive perfume—the most valuable items missing from Brumfield's apartment, and the only items not recovered on Petitioner.

Three jurors voted for acquittal at Petitioner's first trial—the trial where no "permissive inference" instruction was given. After declaring a mistrial, the trial judge made a note of "[t]he weakness of the evidence, the fact that the police officer and the witness are both pinning this whole thing down to 11:15, and the people's theory of the case is there had to be enough time for her to go home, dump stuff and return."

At her second trial, over defense objection, the trial court instructed the jurors in accordance with

CALCRIM No. 376. As read to the jury, CALCRIM No. 376 contains a "permissive inference" advising juries that they may infer, from a defendant's possession of recently stolen goods and "slight" supporting evidence, that she committed the burglary. Petitioner's counsel objected to use of the instruction, arguing that "the simple possession of these items, which essentially Ms. Daire has admitted to, do not help the jurors decide if she had anything to do with this residential burglary," noting that the instruction "places improper emphasis on the possession of those items."

The jury convicted Petitioner of first-degree residential burglary. The trial court sentenced petitioner to forty years to life in prison under California's "Three Strikes" law. All of Petitioner's prior strikes were non-violent.

2. The California Court of Appeal affirmed Petitioner's conviction. The appellate court found that there was sufficient evidence to convict the defendant, and that CALCRIM No. 376 neither misstates the law nor violates due process.

3. The California Supreme Court denied review of Petitioner's petition for review to exhaust state remedies, affirming her conviction. App. B.

REASONS FOR GRANTING THE WRIT

California instructs jurors that they may convict a defendant of burglary—the nation's second-most common crime—by *inferring* guilt from (1) proof that the defendant possessed recently stolen property; and (2) "slight" supporting evidence.[1] It is one of the few

---

[1] California Criminal Jury Instruction (CALCRIM) No. 376 provides:

> If you conclude that the defendant knew [ ] she[ ] possessed property and you conclude that the property had in fact been recently [ ]stolen[ ], you may not convict the defendant of [Burglary] based on those facts alone. However, if you also find that supporting evidence tends to prove [ ]her[ ] guilt, then you may conclude that the evidence is sufficient to prove [ ]she[ ] committed [Burglary]. The supporting evidence need only be slight and need not be enough by itself to prove guilt.

JUDICIAL COUNCIL OF CALIFORNIA, CRIMINAL JURY INSTRUCTIONS (CALCRIM) § 376 (2008).

Section 459 of the California Penal Code defines burglary:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground

(Continued on following page)

states that allows jurors to draw such inferences without qualifying that they are not required to do so.

The model jury instruction that establishes this inference, CALCRIM No. 376, stands in stark contrast both to the analogous federal jury instruction and to the majority of state jury instructions for burglary because of its dearth of qualifying language. These jurisdictions forbid such instructions because reasonable jurors could understand them as *mandating* that the inference be drawn.

At least four state supreme courts (Indiana, Mississippi, Colorado, and South Carolina) have held unconstitutional or rejected jury instructions similar to California's. At least two additional states (Minnesota and Illinois) expressly reject *any* use of permissive inference instructions in cases involving recently stolen property. In addition, five federal circuits (Second, Fifth, Eighth, Ninth, and D.C.) and one state supreme court (Virginia) have implicitly rejected

---

> portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

CAL. PENAL CODE § 459 (West 2009). Section 460 defines burglary of "an inhabited dwelling house" as first-degree burglary. CAL. PENAL CODE § 460 (West 2009).

California's model language by upholding inference instructions only *because* the instructions include explanatory and limiting language missing from the California instructions. Outside of California, no state or federal court has upheld the use of a jury instruction that includes the kind of language in California's model instruction.

This Court should use this case to resolve this fracture. Jury instructions permitting jurors to draw inferences are powerful tools in the hands of prosecutors. And their use is widespread: through such instructions, prosecutors encourage jurors to infer guilt of burglary, larceny, or receiving stolen property from the possession of recently stolen goods; to infer knowledge from the possession of narcotics or contraband; or to infer knowledge of an item's extraterritorial origin from its possession. Read to jurors by judges cloaked in robes and authority, and phrased in the language of command, instructions permitting juries to draw such inferences without explaining that they are not required to do so risk invading the fact-finding province of the jury. Yet comprehensive due process analysis of such instructions has eluded an entire body of state supreme and federal circuit courts. And the holding below—namely, that a jury instruction which fails to inform jurors they are not required to draw an inference of guilt from the possession of recently stolen goods and "slight" supporting evidence—is incorrect.

I. The Decision Below Implicates an Irreconcilable Conflict Among Federal and State Courts

A. United States Supreme Court Doctrine

In *Barnes v. United States*, 412 U.S. 837 (1973), this Court held that criminal trial courts may instruct juries to draw certain logical inferences, provided there is "'a rational connection between the fact proved and the ultimate fact presumed.'" *Id.* at 842 (citing *Tot v. United States*, 319 U.S. 463, 467 (1943)). The jury instruction at issue in that case read:

> Possession of recently stolen property, *if not satisfactorily explained*, is ordinarily a circumstance from which you may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.
>
> However, *you are never required to make this inference*. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. . . .
>
> If you should find beyond a reasonable doubt from the evidence in the case that [the defendant possessed recently stolen property,] you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, *unless*

> *such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's innocence.*

Barnes, 412 U.S. at 840 n.3 (emphasis added). Although *Barnes* reasoned that the instruction was constitutional because it included clarifying language, this Court left unanswered whether permissive inference instructions with wording different from that at issue in *Barnes* would pass constitutional muster. *Id.* at 846 n.11.

Six years later, this Court began to develop a jurisprudential approach to permissive inference instructions in which courts must first conduct a threshold inquiry to determine how a reasonable juror could have interpreted the instruction. *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979). "The federal constitutional question is whether a reasonable juror could have understood the [instruction] as a mandatory presumption that shifted to the defendant the burden of persuasion" on an element of the offense charged. *Francis v. Franklin*, 471 U.S. 307, 316 (1985).

When making that determination, courts must pay "careful attention to the words actually spoken to the jury," considering whether the instructions "*taken as a whole* might have explained the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the

burden of persuasion." *Sandstrom*, 442 U.S. at 514 (emphasis added). Furthermore, *Sandstrom* suggested that courts might consider whether such instructions also inform the jurors that they are not required to draw the inference. *Id.* at 515 (a reasonable juror could have viewed instruction as mandatory where jurors "were not told that they had a choice, or that they *might* infer" the conclusion (emphasis original)); *see also Francis*, 471 U.S. at 316, 322-23; *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 166 n.29 (1979) ("[T]he jury was plainly told that it was free to disregard the presumption.").

Ulster also suggests that courts should instruct jurors to consider exculpatory evidence or explanations consistent with innocence when determining whether to invoke the inference—a type of clarifying language that renders instructions less susceptible to mandatory interpretation. *Ulster*, 442 U.S. at 163 ("[T]he instructions [are permissive because they] plainly directed the jury to consider all the circumstances tending to support or contradict the inference."); *see also United States v. Rubio-Villareal*, 967 F.2d 294, 300 n.9 (9th Cir. 1992) ("[T]he *Barnes* instruction was so qualified and conditioned that it was unlikely to convey a message to the jury that the judge thought the evidence was sufficient to convict. Furthermore, the jury was advised in the same instruction to consider the defendant's possession of stolen property 'in light of the surrounding circumstances shown by the evidence in the case.' ").

Despite the refinements of due process law provided in *Sandstrom*, *Ulster*, and *Francis*, lower courts remain confused and divided over the type of language that must be included in permissive inference jury instructions to satisfy due process, as discussed below. Some jurisdictions have followed the analytical framework advanced by *Sandstrom* and its progeny, while others have adopted a more limited reading of *Barnes*. The result has been a varied and contradictory state supreme and federal circuit court doctrine on the proper standards with which to assess the constitutionality of permissive inference jury instructions.

B. Many State Supreme Courts Have Upheld Inference Instructions that Lack Qualifying Language

In 1962, the California Supreme Court upheld against a due process challenge California's model jury instruction for burglary which permits jurors to infer guilt based on the defendant's mere possession of recently stolen property and "slight" supporting evidence.[2] *People v. McFarland*, 376 P.2d 449 (Cal. 1962).[3]

---

[2] The permissive inference instruction upheld in *McFarland* is largely identical to CALCRIM No. 376, the jury instruction at issue in this case.

[3] Later courts relied on *McFarland* to uphold CALCRIM No. 376 against constitutional attack because of the similarities between CALCRIM No. 376 and the instruction at issue in

(Continued on following page)

California's current model instruction for burglary reads:

> If you conclude that the defendant knew [ ]she[ ] possessed property and you conclude that the property had in fact been recently [ ]stolen[ ], you may not convict the defendant of [Burglary] based on those facts alone. However, if you also find that supporting evidence tends to prove [ ]her[ ] guilt, then *you* may conclude that the evidence is sufficient to prove [ ]she[ ] committed [Burglary]. The supporting evidence *need only be slight* and need not be enough by itself to prove guilt.

JUDICIAL COUNCIL OF CALIFORNIA, CRIMINAL JURY INSTRUCTIONS (CALCRIM) § 376 (2008) (emphasis added).

Other states have also rejected due process challenges to similar jury instructions. *See, e.g.*, *State v. Lewis*, 242 N.W.2d 711, 724 (Iowa 1976); *People v. McClendon*, 533 P.2d 923, 924 (Colo. 1975); *State v. Ponthier*, 449 P.2d 364, 365 (Idaho 1969). In addition, at least two federal circuits have upheld instructions permitting jurors to infer knowledge from the possession of narcotics or contraband, despite the absence of qualifying language. *See, e.g., United States v.*

McFarland. *See People v. O'Dell*, 64 Cal. Rptr. 3d 116, 120-22 (Ct. App. 2007); *People v. Solorzano*, 63 Cal. Rptr. 3d 659, 666-67 (Ct. App. 2007).

Cota-Meza, 367 F.3d 1218 (10th Cir. 2004); *United States v. Jennewein*, 590 F.2d 191 (6th Cir. 1978).

C. Other Jurisdictions Have Rejected Similar Jury Instructions

At least four state supreme courts (Indiana, Mississippi, Colorado, and South Carolina) have rejected jury instructions similar to California's—even where those instructions contain some qualifying language. These courts have struck down these instructions on various grounds.

Indiana has "repeatedly condemned" such instructions—ultimately because they violate the Due Process Clause. *Crawford v. State*, 550 N.E.2d 759, 761 (Ind. 1990). In *Underwood v. State*, 367 N.E.2d 4 (Ind. Ct. App. 1977), subsequently endorsed by *Crawford*, the Indiana court considered an instruction similar to California's model jury instruction on burglary.[4] The court found that the instruction

---

[4] The instruction read:

> The exclusive possession of stolen property soon after a theft has been committed, if not explained to the satisfaction of the jury, may raise an inference that the person in possession of such stolen property is guilty of the Theft charged. The inference of guilt does not arise from the mere possession of the property stolen, but arises from the fact of its possession shortly after it has been stolen, coupled with the absence of a satisfactory explanation, or of anything tending to show that such possession is or may be consistent with innocence.

367 N.E.2d at 4.

"substantially prejudiced [the defendant's] right to a fair trial," and reversed his conviction because "[t]he effect of the instruction was to squarely place upon the defendant the burden of convincing the jury of his innocence," and because "[f]undamental due process of law does not permit the burden to be shifted to the defendant." *Id.* at 5. Indiana courts have repeatedly struck down similar instructions. *See Arthur v. State*, 86 N.E.2d 698 (Ind. 1949); *Vaughn v. State*, 19 N.E.2d 239 (Ind. 1939); *Dedrick v. State*, 2 N.E.2d 409 (Ind. 1936); *Phillips v. State*, 377 N.E.2d 666 (Ind. Ct. App. 1979); *Abel v. State*, 333 N.E.2d 848 (Ind. Ct. App. 1975). In *Sansom v. State*, 366 N.E.2d 1171 (Ind. 1977), the Indiana Supreme Court clarified its objection to such instructions: "[t]he inference, if any, to be drawn from a finding that the defendants were in possession of the stolen property lies in the exclusive province of the jury. . . . An instruction as to what evidence warrants an inference of guilt clearly invades the jury's province." *Id.* at 1173-74. In *Crawford*, the Indiana Supreme Court expressly approved the *Sansom* dicta and "reaffirm[ed] the precedential vitality of *Underwood* and the other progeny of *Dedrick*." 550 N.E.2d at 761.

The Mississippi Supreme Court rejected a similar instruction in *Harper v. State*, 355 So.2d 314 (Miss. 1978).[5] The court rejected the instruction because it

---

[5] That instruction stated:

The Court instructs the Jury that possession of goods recently stolen does not in itself create presumption or

(Continued on following page)

failed to "inform the jury that the possession of property recently stolen is only a circumstance to be considered by the jury and in the absence of reasonable explanation the jury may infer guilt of burglary." *Harper*, 335 So.2d at 316.

In *Wells v. People*, 592 P.2d 1321 (Colo. 1979), the Colorado Supreme Court rejected a permissive inference jury instruction on recently stolen property in a robbery trial. The trial judge charged the jury that the possession of recently stolen property "serve[d] to create an inference" that the defendant was involved in the robbery.[6] *Id.* at 1324. The court held that "the

---

> amount to prima facie proof that the possessor is guilty of breaking and entering the building in which the goods were kept; but if other evidence in the case shows beyond a reasonable doubt, and to a moral certainty that the building was broken and entered by someone, that the theft of the goods was accomplished at the time and by means of the breaking and entering, proof of possession unexplained, or in the absence of circumstances raising a reasonable doubt as to whether the possession of the goods had been acquired otherwise than by the crime charged, is sufficient to warrant a conviction.

Harper, 355 So.2d at 316.

[6] The trial judge's instruction stated:

> You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the property or some of the property of Diana Hansen Lockhart taken from her during the alleged robbery of September 11th, 1974, was shortly thereafter found in the exclusive possession of the defendant, then this possession serves to create an inference or incriminating circumstance that the defendant participated in

(Continued on following page)

instruction might have been more precisely articulated in more detail, placing in focus the proper function of the inference that may arise from the unexplained and exclusive possession of property recently taken. . . ." *Id.* The court warned that a reasonable juror can easily misconstrue a permissive inference as mandatory unless the instruction is absolutely explicit regarding its permissive nature. *Id.* at 1326 ("[A]lthough the instruction uses the word 'inference,' read as a whole it almost compels a verdict of guilt if the jury finds the possession to be exclusive, recent and unexplained.").

Finally, the South Carolina Supreme Court also rejected a similar instruction.[7] *State v. Cooper*, 306

---

said robbery and that such evidence, if established beyond a reasonable doubt, can be sufficient in and of itself to justify a verdict of "Guilty" for the charge of robbery in the absence of an explanation derived from the evidence in the case, raising a reasonable doubt as to the defendant's guilt.

Yet, in order to give the circumstance the force of evidence sufficient to sustain a conviction, the possession must be exclusive, recent, and unexplained.

Wells, 592 P.2d at 1323-24.

[7] The instruction at issue in *Cooper* recited:

Now, ladies and gentlemen, in the proof of grand larceny our law says that the principle has long been recognized in this state that, where one is found in possession of recently stolen property a rebuttal (*sic*) inference of a fact arises that a person in possession of recently stolen property is the thief, and this inference is one of fact and not one of law. It's an evidentiary inference. It relates back to the circumstantial evidence

(Continued on following page)

S.E.2d 598 (S.C. 1983). In holding that the instruction was "erroneous," the court said that the "fact that defendants are found in possession of recently stolen property should be characterized merely as an evidentiary fact and not described as 'rebuttable' or requiring a 'reasonable explanation.'" *Id.* at 599.

Courts have also struck down the use of permissive inference instructions in drug or weapons possession cases, particularly where the inferred element is knowledge. For example, an *en banc* panel of the Ninth Circuit in *Rubio-Villareal* struck down a permissive inference instruction that allowed the jury to convict a defendant of possession of narcotics based on the sole facts that the defendant was driving a car and that the car contained cocaine.[8] 967 F.2d at 295,

---

> test. . . . Upon proof of possession of recently stolen goods the law permits the jury to infer guilt unless the jury finds a reasonable explanation of such possession from all the evidence presented at the trial.

306 S.E.2d at 599.

[8] The trial court judge charged the jury:

> You are instructed that if you find that the defendant was the driver of a vehicle containing contraband in this case; and if you find that the cocaine was found inside that vehicle and concealed in its body, you may infer from these two facts, that the defendant knew that the cocaine was in the automobile; however, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrants any inference which the law permits the jury to draw.

967 F.2d at 295.

299. The court disapproved of the instruction for two reasons. First, "by focusing the jury on two isolated facts, the instruction permitted the jury to convict without considering all the evidence presented at trial." *Id.* at 300. Second, "[w]hen a judge tells the jury it may infer knowledge from two isolated facts, he risks conveying the message to the jury that he has weighed the evidence in his own mind and believes it is sufficient to convict. . . . [D]isclosing the judge's own opinion . . . created the risk that the jury would abdicate its responsibility to evaluate the evidence in deference to the judge." *Id.* at 299. Further, it rejected the government's argument that a generic instruction could cure this particular instruction's shortcomings: "this [general] instruction was given ten pages before the permissive inference instruction at issue and could not overcome the misdirection of a specific instruction that permitted the jury to find an element of the crime without considering all the evidence." *Id.* at 300.

D. Other Jurisdictions Reject Altogether the Use of Permissive Inference Jury Instructions in Recently Stolen Property Cases

Two other jurisdictions (Minnesota and Illinois) reject entirely the use of permissive inference jury instructions in recently stolen property cases. *See* STEPHEN E. FORESTELL & WAYNE A. LOGAN, 10 MINNESOTA PRACTICE SERIES § 16.48 cmt. (5th ed. 2008) ("Ordinarily, instructions as to permissible inferences

should not be given to the jury."); ILLINOIS SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL § 13.34 (4th ed. 2008) ("[N]o instruction [should] be given on this subject [of inference arising from exclusive possession of recently stolen property], either in a theft case or elsewhere. The Committee believes that particular types of evidence should not be singled out, but should be left to the argument of counsel. . . . The Committee believes that any possible benefit from giving this instruction is outweighed by problems resulting from its use.").

E. Courts Upholding Permissive Inference Instructions Have Relied on Qualifying Language in the Instructions

At least five federal circuits and one state supreme court have implicitly rejected California's model language by upholding inference instructions only because the instructions include conditional language that is missing from the California instructions. Consistent with *Sandstrom* and *Francis*, these courts relied on language informing jurors that they are not required to draw the inference in finding the instructions constitutional. *See United States v. Beltran-Garcia*, 179 F.3d 1200 (9th Cir. 1999); *United States v. Parker*, 32 F.3d 395, 402 (8th Cir. 1994) ("The instruction explicitly informed the jury that they 'may, but are not required to, find or infer that the defendant intended to distribute' based on possession of a large quantity of methamphetamine."); *United States v. Ferro*, 709 F.2d 294, 297 n.6 (5th Cir.

1983) ("In addition to instructing the jury that they *may*, rather than *shall* draw the inference, the district court instructed them that while the law *permits* them to draw the inference, they must acquit the accused, if any possession is consistent with innocence or if any juror entertains reasonable doubt of guilt." (emphasis in original)); *United States v. Murphy*, 703 F.2d 1335 (5th Cir. 1983); *United States v. Tavoularis*, 515 F.2d 1070, 1075 n.11 (2d Cir. 1975) (recognizing that the jury instruction implicated the due process issue but noting that the context of the case presented "no occasion" to decide it); *Pendergrast v. United States*, 416 F.2d 776, 787 (D.C. Cir. 1969) ("The inference is indulged only where the accused is found in exclusive possession of property recently stolen and the possession is not otherwise explained."). These decisions have also given weight to language in the instructions directing jurors to consider exculpatory evidence and explanations consistent with the defendant's innocence when determining whether to even invoke the inference. *See, e.g.*, *Dobson v. Commonwealth*, 531 S.E.2d 569, 572 (Va. 2000) ("[The permissive inference instruction] benefited the defendant by effectively informing the jury that it could not infer that the defendant was the thief if he offered a reasonable explanation of possession consistent with his innocence.").

It follows from the logic of these cases that the courts in the Second, Fifth, Eighth, Ninth, and D.C. Circuits, and the Virginia Supreme Court, would reject as infirm California's model jury instruction at issue here.

F. Academic Commentators Have Highlighted the Due Process Concerns Raised By Permissive Inference Instructions

Several commentators have highlighted the due process concerns that permissive inference instructions raise. The scholarly consensus is that, in order to comport with due process, jury instructions that include inferences must also direct jurors to consider the defendant's explanation. *See* Charles Collier, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 STAN. L. REV. 423 (1986) (pointing to social science studies suggesting that permissive inferences are in reality "illusory"); *id.* at 460 ("Permissive presumptions can have essentially the same function and effect as mandatory presumptions in the deliberations of a jury."); Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1208-09 (1979); Peter D. Bewley, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 342 (1970) ("[T]he rational-connection test . . . can never adequately protect the defendant's right to have all elements of the prosecution's case proved beyond a reasonable doubt.").

II. California's Model Jury Instruction on Recently Stolen Property Violates Due Process

California has one of the worst permissive inference instructions in the country. In a line of cases

dating back to 1962, the California Supreme Court has rendered the state's model instruction impenetrable to constitutional attack, straining this Court's holding in *Barnes* and shirking the requirements of due process as defined by *Sandstrom* and its progeny.

CALCRIM No. 376 permits jurors to infer guilt of burglary from (1) the possession of recently stolen property and (2) "slight" supporting evidence. Some California courts have even held that the defendant's silence can satisfy the "slight" supporting evidence requirement under the instructions. *See, e.g.*, *McFarland*, 376 P.2d at 454-55; *People v. Anderson*, 61 Cal. Rptr. 3d 903, 924-25 (Ct. App. 2007).

California's model instruction contains no language cautioning jurors that they are *not required* to draw such an inference. Moreover, CALCRIM No. 376 fails to direct the jury to consider whether the defendant's explanation, where offered, is satisfactory. California courts have rejected due process challenges to the instruction on these explicit grounds. *See People v. Williams*, 94 Cal. Rptr. 2d 727, 737 (Ct. App. 2000) (rejecting argument that jury instruction shifts the "'lack of explanation' factor from a foundational requirement to merely one of any number of alternative corroborating factors," thereby lessening the prosecutor's burden of proof). Rather than conduct the due process analysis mandated by *Sandstrom* and its progeny, California courts have relied on the instruction's mere use of the word "may" to uphold it against due process attack. *See People v. Yeoman*, 72 P.3d 1166, 1197 (Cal. 2003) ("[T]he instructions in

question permit, but clearly do not require, the jury to draw the inferences described therein."). Worse yet, California's is the only published instruction that directs a jury to convict based on "slight" supporting evidence. This "slight evidence" language is an irresponsible construction of *Ulster* and *Barnes*.

III. The Question Presented Significantly Impacts the Administration of Criminal Justice Because Burglary is a Pervasive Crime

According to the FBI's Uniform Crime Reporting (UCR) Program, there were 2.18 million burglaries in the United States in 2007. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES 2007 tbl. 1 (2008), http://www.fbi.gov/ucr/cius2007/data/table_01.html. The number of burglaries exceeded that of any other crime category in the UCR, except for larceny-theft.

Permissive inference instructions concerning recently stolen property are most often invoked in burglary and theft cases. And as noted above, courts use permissive inference instructions to allow jurors to infer knowledge elements in other crimes, too, including narcotics and weapons possession and trafficking offenses. *See, e.g., Rubio-Villareal*, 967 F.2d at 294. Accordingly, the great disparity in courts' due process analysis of such instructions is significantly compromising the constitutionality of lower court proceedings around the country today.

IV. This Case is an Excellent Vehicle for Considering the Question Presented

The circumstances of this case are ideal for the Court to address several problems in the current use of permissive inference instructions, particularly in cases involving recently stolen property.

Sophia Daire had two trials. In the first trial, which resulted in a hung jury, the permissive inference instruction at issue here was not read to the jury. At her second trial, where she was convicted, the jury heard the instruction challenged in this appeal. Because the prosecution and defense evidence was similar in both trials, it is fair to say that the disputed instruction played a central role in Ms. Daire's conviction for burglary and subsequent sentence to life in prison under California's Three Strikes law.

Ms. Daire was arrested in possession of costume jewelry, children's underwear, a nightgown, soap, and "other items" that a victim later identified as missing from her apartment. The victim was also missing $200 in cash and approximately $300-400 worth of perfume, items that were conspicuously never recovered. The sole prosecution eyewitness at trial testified that, as he was getting ready one morning at a friend's residence, he saw a man with cornrows wearing a Miami Dolphins jersey loitering near the victim's apartment. Ms. Daire was arrested wearing a Dolphins jersey, though she did not have cornrows and at 110 pounds was much smaller than the man the witness thought he saw. At Ms. Daire's first

trial—where the jury was not charged with CALCRIM No. 376—the jury hung, with three jurors voting to acquit. At her second trial, the jury heard CALCRIM No. 376, which includes the inference language at issue here. Ms. Daire was convicted at her second trial entirely based on circumstantial evidence. *The only material difference in the jury instructions given in Petitioner's first trial versus her second was the use of CALCRIM No. 376 in the latter proceeding.*

Ms. Daire testified at trial, offering an explanation consistent with innocence: she found a bag with the aforementioned items next to a dumpster and picked up the bag to carry the cans that she recycles for a living. She then looked into the dumpster in search of cans with which to fill the bag. There she found a clean, discarded jersey and, in need of more suitable clothing at the time, put it on. Her theory of the case was that a man with cornrows, after burglarizing the victim's apartment, stole the valuable property and discarded the identifying jersey and less valuable property in or by the dumpster where Ms. Daire later found them.

Ms. Daire's case squarely demonstrates the danger presented by instructions like CALCRIM No. 376. She was found in possession of recently stolen property mere hours after the burglary took place. She did not have in her possession any of the valuable items allegedly taken at the time of arrest. The sole corroborating evidence offered at trial was an identification laden with errors.

Though the circumstantial evidence was sufficient to convict, *it was also sufficient to acquit*, as evidenced by the hopelessly deadlocked jury in the first trial. Thus, in being charged with CALCRIM No. 376, a reasonable juror could have believed he was required to convict Ms. Daire based on her possession of the recently stolen property and the slight corroborating evidence of a shaky identification—*without considering her explanation consistent with innocence.* That is, CALCRIM No. 376 improperly focused the jurors on the Dolphins jersey and recovery of the less valuable items on Ms. Daire, in contravention of the Due Process Clause of the Fifth and Fourteenth Amendments. And because of the severity of California's Three Strikes Law, the charge given to the jury was of the utmost importance: Ms. Daire is currently serving forty years to life as a result of the conviction.

Moreover, because the jury convicted Ms. Daire of burglary, the case presents the Court with an opportunity to address what is perhaps the most tenuous inference to be drawn from the possession of stolen goods—guilt of burglary—as opposed to the more frequent (and less objectionable) inferences of guilt of larceny or other theft-related offenses. Indeed, several courts have questioned whether permissive inference instructions should be used in burglary cases where the ultimate facts—the elements of the offense—require additional inferential steps from the proven facts, as compared with those inferential steps required to find guilt of larceny from possession of

stolen goods. *See, e.g.*, *State v. Searle*, 339 So.2d 1194 (La. 1976).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL ROMANO
Counsel of Record
STANFORD LAW SCHOOL
CRIMINAL DEFENSE CLINIC
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-1900

April 24, 2009

APPENDIX A

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE, Plaintiff and Respondent,

v.

SOPHIA LORRAINE DAIRE, Defendant and Appellant.

B201976

November 19, 2008, Filed

COUNSEL: Tara K. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: ASHMANN-GERST, J.; BOREN, P. J., DOI TODD, J. concurred.

OPINION BY: ASHMANN-GERST

OPINION

Sophia Lorraine Daire, also known as Candy Mitchell, Sophia Mitchell and Sophia Daria, appeals from a judgment entered upon her conviction by jury of first degree burglary (Pen. Code, § 459).[1] Appellant

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

admitted the special allegations that she had suffered three prior felony convictions within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (a)(1) and (b) through (i) and one prior prison term within the meaning of section 667.5, subdivision (b). After denying appellant's *Romero*[2] motion seeking to dismiss two of her strikes, the trial court sentenced her to a term of 25 years to life on her burglary conviction, plus three consecutive five-year enhancements under section 667, subdivision (a). Appellant contends that (1) there was insufficient evidence to sustain her conviction, thereby violating her rights to due process and a fair trial, (2) instructing the jury with an unmodified version of *CALCRIM No. 376* violated her state and federal rights to proof beyond a reasonable doubt and due process, and (3) the trial court abused its discretion by refusing to strike appellant's prior felony strikes, resulting in punishment that was cruel and/or unusual under the federal and state Constitutions.

We affirm.

FACTUAL BACKGROUND

The prosecution's evidence

On the morning of August 9, 2006, Ronald Ryals (Ryals) was staying with a friend, at an apartment on

---

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Central Avenue, in the City and County of Los Angeles. Ryals awoke between 10:00 and 11:00 a.m., sat up in bed, and looked out the window. Across the street, he saw a person dismounting a silver bicycle and approaching the apartment complex. The person looked in a trash can in a side yard, but did not remove anything, touched a window screen and then climbed into the front window of an apartment.

Ryals could not see the person's face or determine the person's sex, age, height or facial features, though he believed it was a male. The person was either Latino or African-American, with hair braided into cornrows, and was wearing a Miami Dolphins jersey with the number "50," "51" or "54" on it.

At approximately 12:30 p.m., Ryals and his friend left in his friend's car. As they did, Ryals noticed that the screen on the window he had seen the person enter was cut or damaged and flapping in the wind, and the bicycle was gone.

Deputy Sheriff Mike Fairbanks detained appellant for a traffic stop because she was riding her bicycle on the sidewalk. She looked "weathered," smelled and appeared homeless. Her hair was in an "Afro" in the front, with cornrows in the back. On the police report, Deputy Fairbanks checked the "natural" box, not the "braided" box, for hairstyle.[3] The

---

[3] It is not uncommon in that area of Los Angeles to see people riding bicycles, wearing their hair in cornrows or sifting through garbage cans.

deputy searched appellant and found 15 to 20 pieces of costume jewelry, a placemat, as well as a shopping bag with children's underwear, soap, body glitter and other items. Appellant had only $11 and change and did not have any type of tools with which to cut a window screen.

Approximately 45 minutes after leaving his apartment, 10 blocks away, Ryals saw Deputy Fairbanks apprehending a person riding a silver bicycle and wearing a Miami Dolphins jersey with the number "54" on it. Ryals spoke to the deputy and reported what he had seen and that he thought the person he had seen was a man.

After speaking with Ryals, Deputy Fairbanks went to the location that Ryals mentioned and found the front door ajar. He saw a torn kitchen-window screen, and an apartment that was messy, with drawers and closets opened and rummaged through. Placemats on the kitchen table matched the placemat confiscated from appellant. No usable fingerprints were found inside.

Leporche Brumfield (Brumfield) lived in the apartment which Ryals had seen the intruder enter. When she left for work early in the morning of August 9, 2006, her kitchen window screen was not damaged and her house was not in disarray. At work, she received a call from the sheriffs and returned home immediately. She identified the items the deputies had recovered. One of the items of clothing still had the tags on it. She found that $200, costume jewelry,

body glitter, a placemat, a disposable camera, underwear, soap and a bag were missing. She later found that some bottles of perfume were also missing.

The defense's evidence

Appellant testified on her own behalf. She had a theft related conviction in 1993. She recycles for a living. On August 9, 2006, she went into Brumfield's garbage bin looking for recyclable items. There, she found a jersey which she put on, about 40 pieces of "mangled" jewelry which she put in her pocket, and a bag sitting next to a trash can, which she took, without looking inside. She denied burglarizing Brumfield's home.

DISCUSSION

I. Sufficiency of the evidence

Appellant contends that her rights to due process and a fair trial were violated because there is insufficient evidence to sustain her conviction. She argues that the evidence failed to establish "that [she] was the person who climbed through the window of Brumfield's apartment. . . . [¶] There was one eyewitness presented at trial. The prosecution's case rested solely on the identification of a football jersey with no other direct or scientific evidence of guilt." The eyewitness testimony was uncorroborated and was given by a person who saw the burglar for only 15 seconds, believed the person was a man and incorrectly identified

the person's hairstyle. This contention is without merit.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) We must presume every fact in support of the judgment that the trier of fact could have reasonably deduced from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Reversal on this ground is unwarranted unless "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra*, at p. 331.) This standard of review is the same in cases involving circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

There is substantial evidence here identifying appellant as the burglar. There are numerous ways of identifying a suspect. While seeing and recognizing the person's face is the most certain method, other identifying factors, such as physical attributes, clothing and mannerisms may suffice. Ryals described the person who entered Brumfield's apartment by her clothing and other factors. He said the burglar wore a

Miami Dolphins jersey, with a number in the 50's on it, and rode a silver bicycle. Ryals further described the intruder as African-American or Latino with hair styled in cornrows. Appellant, an African-American, was detained not far from the scene of the burglary, an hour or so later, wearing such a jersey with the number "54," riding a silver bicycle, and having her hair in cornrows, in the back. Because Ryals saw appellant as she climbed through the window facing his residence, he saw her primarily from the back, where her hair was in cornrows. Because cornrows are worn by both men and women, and the intruder was wearing a sports jersey, it is understandable that he would assume the person was a male. While each of the identifying characteristics of the intruder Ryals articulated was not separately so distinctive, the combination of factors point indisputably, and beyond a reasonable doubt, to appellant.

Appellant's identity as the intruder was corroborated by other evidence. When stopped by Deputy Fairbanks, she possessed 15 to 20 pieces of costume jewelry, a shopping bag containing children's clothing, underwear, soap, body glitter, and a placemat and other items that Brumfield identified as hers. "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt." (*People v. McFarland* (1962) 58 Cal.2d 748, 754 (*McFarland*).) Appellant's claim that she found these items in and around a trash bin at

Brumfield's residence lacked credibility and was contradicted by other testimony. Brumfield testified that she had not thrown away any of the items, and Ryals testified that when the intruder opened the trash bin, nothing was removed. Two items are of particular significance. One article of clothing was new and still had the tags on it. The placemat in appellant's possession matched the placemats that the deputies found on Brumfield's kitchen table. It is unlikely that a new item and a placemat that matched a set of placemats on the victim's table would have been found in a trash bin.

II. *CALCRIM No. 376*

Over defense objection,[4] the trial court instructed the jury in accordance with *CALCRIM No. 376* that evidence that appellant knew she possessed stolen

---

[4] Defense counsel argued that: "This instruction allows the jurors to take evidence of the fact that my client is in possession of items that are ultimately determined to be of a stolen nature and use that possession in and of itself to find her guilty of the crime of burglary. Notwithstanding, . . . the fact that those items could be obtained completely innocently. She found them, in essence, as abandoned property or lost property. . . . The danger of this instruction is that the jurors will use this instruction or the presence of these items in Ms. Daire's possession to fix a missing element or issue of the People's case. The simple possession of these items, which essentially Ms. Daire has admitted to, do not help the jurors decide if she had anything to do with this residential burglary. And this instruction I think places improper emphasis on the possession of those items and what they are to do with that."

property and that the property had in fact been recently stolen was insufficient by itself to convict appellant.[5]

A. Appellant's contention

Appellant contends that the trial court erred in instructing the jury in accordance with *CALCRIM No. 376*. She argues that that instruction misstates the law by eliminating the requirement that to draw an inference of guilt from possession of stolen property, the possession must be unexplained. She further argues that removal of the explanation requirement and failure to instruct that the lack of explanation must be proved beyond a reasonable doubt, "unconstitutionally shifts the burden of proof to the defendant in violation of the Due Process clause of the 14th Amendment." This contention is without merit.

---

[5] *CALCRIM No. 376* as given provides: "If you conclude that the defendant knew she possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of Burglary based on those facts alone. However, if you also find that supporting evidence tends to prove her guilt, then you may conclude that the evidence is sufficient to prove she committed Burglary. [¶] The supporting evidence need only be slight and need not be by itself enough to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove her guilt of Burglary. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

B. CALCRIM No. 376 does not misstate the law

We review the wording of a jury instruction de novo and assess whether the instruction accurately states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Instructions are reviewed in the context of the entire charge to the jury, rather than in artificial isolation. (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964.)

As previously stated, possession of recently stolen property itself raises a strong inference that the possessor knew the property was stolen, requiring only slight corroboration to permit an inference of guilt. (*McFarland, supra*, 58 Cal.2d at p. 754.) While unexplained possession of stolen property is a circumstance that gives rise to the permissive inference of guilt, it is not the only circumstance. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 947-948 (*Anderson*).) As explained in *Anderson*: "In *McFarland*, the court stated the following rule: 'Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating a consciousness of guilt, an inference of guilt is permissible and it is for the jury to determine whether or not the inference should be drawn in the light of all the evidence.' [Citation.] However, before stating the foregoing rule, the state high court in *McFarland* acknowledged the more general rule that possession of recently stolen property together with other corroborating

evidence is sufficient to infer guilt. [Citation.] The court went on to state that a failure to explain or a false explanation of such possession is one type of corroborating evidence. In other words, the court in *McFarland* did not say that possession must be unexplained to be relevant but that the lack of an explanation for possession is one type of corroborating evidence sufficient to support a conviction. [Citation.]" (*Anderson, supra*, at p. 948.)

In *Barnes v. United States* (1973) 412 U.S. 837 (*Barnes*), the highest court in the land stated that "[o]f course, the mere fact that there is some evidence tending to explain a defendant's possession [of stolen property] consistent with innocence does not bar instructing the jury on the inference." (*Barnes, supra*, at p. 845, fn. 9; *see also People v. Williams* (2000) 79 Cal.App.4th 1157, 1173 [dealing with *CALJIC No. 2.15*, the predecessor of *CALCRIM No. 376*, the appellate court stated, "*Barnes* [does not] suggest that no circumstances other than the lack of an explanation can combine with conscious possession of recently stolen property to support an inference of guilt"].) Discussing *Barnes*, *Anderson* states that the court in *Barnes* found no problem with an instruction that "'"[p]ossession of recently stolen property, if not *satisfactorily* explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen. . . .'" In other words, as in *McFarland*, possession

of recently stolen property coupled with a lack of explanation is sufficient to support conviction. However, the court did not say this was the only acceptable type of corroborating evidence." (*Anderson, supra*, 152 Cal.App.4th at p. 948, italics added.)

These authorities make clear that possession of stolen property need not be unexplained to permit an inference of guilt. *CALCRIM No. 376* did not therefore incorrectly state the law by failing to include that *unexplained* possession is the only circumstance that would give rise to that inference. The jury must assess *any* explanation of the possession of stolen property to determine whether it is adequate to preclude the inference.

Contrary to appellant's assertion, *CALCRIM No. 376* does not advise the jury to ignore any explanation of the possession of stolen property, "no matter how plausible or compelling." In fact, that instruction specifically informs the jury that it cannot convict the defendant unless convinced that each fact essential to guilt is proved beyond a reasonable doubt, with no limitation on the evidence that may be considered in determining if the People have met that burden. As we stated in *O'Dell*, *CALCRIM No. 376* "does not suggest that the jury may ignore a defendant's evidence. [Citation.] It is for the jury to decide whether to make an inference of guilt based upon the totality of the evidence presented. [Citation.]" (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1575 (*O'Dell*).)

Bolstering this conclusion, other instructions required the jury to consider *all* relevant evidence, which includes evidence explaining possession of stolen property. (*See CALCRIM No. 220* ["you must impartially compare and consider all the evidence that was received throughout the entire trial"]; *CALCRIM No. 222* ["[y]ou must use only the evidence that was presented in this courtroom"].) We presume that the jury followed these instructions. (*See, e.g., People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

C. CALCRIM No. 376 does not violate due process

We similarly reject appellant's claim that failure to include the "no explanation" requirement in *CALCRIM No. 376* and to instruct that the prosecution must prove lack of explanation beyond a reasonable doubt violate due process. *CALCRIM No. 376* advises the jury that it may not convict appellant on evidence that she possessed stolen property alone. It provides that the jury "may" find sufficient evidence to prove the burglary if, in addition to possession of the stolen property, it finds "supporting evidence tend[ing] to prove her guilt." (*CALCRIM No. 376.*) The inference that possession of stolen property creates is merely permissive, not mandatory. It neither changes the prosecution's burden of proving every element of the offense or otherwise violates due process. (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1036; *O'Dell, supra,* 153 Cal.App.4th at pp. 1574-1575 [similar language to *CALCRIM No. 376* in predecessor

CALJIC No. 2.15 "was repeatedly approved in the face of constitutional challenges"].)

III. *Romero* motion

A. Background

Appellant was convicted of first degree burglary and admitted three prior felony convictions within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (a)(1) and (b) through (i) and one prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced her to an aggregate state prison term of 40 years to life, calculated as follows: 25 years to life for her conviction of burglary as a three striker, plus three 5-year, habitual offender enhancements under section 667, subdivision (a)(1). The one-year prior prison term enhancement was stayed.

Before sentencing, appellant filed a *Romero* motion, seeking to dismiss two of her felony strikes. She argued that she was not young (41 years old), her life of crime was the result of poverty, homelessness and drug abuse, her burglaries were primarily of homes where the residents were not present, her current offense was minor and nonviolent, and she would receive a lengthy sentence even if two strikes were dismissed.

The trial court found that appellant had a "substantial career of criminality"[6] and was never out of prison for a substantial time before reoffending. It concluded: "[A]s much as I understand that, it is her drug problem that is spurring her on to re-offend and do so. There is nothing about this particular offense and its timing and the prior offenses that would indicate any mitigation which would cause me to strike any of them."

B. Contention

Appellant contends that the trial court erred in denying her *Romero* motion. She argues that it based its decision exclusively on her record of recidivism,

---

[6] Appellant's criminal history included, among other runins with the law: (1) a June 1984 conviction of misdemeanor tampering with a vehicle (Veh. Code, § 10852), for which she was placed on 12 months probation, (2) a June 1985 burglary conviction, for which she received probation, conditioned upon a year in county jail, (3) a February 1987 conviction of first degree burglary, for which she received a four-year sentence, (4) a March 1987 burglary conviction, for which she was placed on three-years formal probation, (5) a September 1989 conviction of taking a vehicle without the owner's consent (Veh. Code, § 10851, subd.(a)), for which she received 16 months in prison, (6) an August 1990 conviction of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), for which she received a two-year sentence, (7) a March 1993 conviction of loitering on private property (§ 647, subd. (h)), for which she was placed on two-years probation, (8) a March 1994 second degree burglary conviction, for which she received a 12-year sentence, and (9) a September 2001 conviction of possession of a controlled substance, for which she received a five-year prison sentence.

without considering other individualized factors, including her age, substance abuse, nonviolent nature of her current offense and that her prior offenses were not of increasing seriousness. She claims that these facts regarding her background, character and prospects "amply support the conclusion that she may deemed outside the spirit of the Three Strikes sentencing scheme." Appellant further contends that the 40-year-to-life sentence constituted cruel and unusual punishment under the Eighth Amendment of the federal Constitution and article I, section 17 of the California Constitution because it is not proportionate to the offense. These contentions are without merit.

C. Romero motion

Section 1385 provides in part: "The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) *Romero* held that trial courts have authority to strike a prior conviction pursuant to section 1385. In deciding whether to do so, the trial court must take into account the defendant's background, the nature of his current offense and other individualized considerations. (*Romero, supra*, 13 Cal.4th at p. 531.) Striking a serious felony is an extraordinary exercise of discretion and is reserved for "extraordinary" circumstances. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 905.)

Determining what constitutes "'in furtherance of justice'" entails consideration "'"both of the constitutional rights of the defendant, and *the interests of society represented by the People*, ..." At the very least, the reason for dismissal must be "that which would motivate a reasonable judge."'" (*Romero, supra*, 13 Cal.4th at pp. 530-531.) Thus, in deciding whether to strike a prior conviction, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the ruling on a *Romero* motion for abuse of discretion. (*See People v. Carmony* (2004) 33 Cal.4th 367, 378.) "'[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . .'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.)

We begin by rejecting appellant's assertion that the trial court based its denial of her *Romero* motion exclusively on appellant's record of recidivism, without considering other individualized factors. The trial court is "presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers* (1999) 69

Cal.App.4th 305, 310.) Though the trial court focused on appellant's record of recidivism in its oral pronouncement of its ruling, nothing in the record before us suggests that that was all that the trial court considered. To the contrary, the record suggests otherwise. Defense counsel argued a myriad of individualized considerations, which the trial court heard and must have considered and found insufficient to trump appellant's unrelenting record of recidivism, which likely would have been even greater had she not spent substantial periods of time incarcerated. We have found no case that compels a judge to strike a prior conviction where there is an "unrelenting record of recidivism" (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320), and the defendant is "the kind of revolving-door career criminal for whom the Three Strikes law was devised" (*Ibid.*). Spanning a period of more than two decades, appellant had three prior burglary convictions, several burglary arrests and other felony and misdemeanor convictions, interspersed with several significant prison terms.

Further, appellant underestimates the seriousness of her current and prior burglary convictions, characterizing her current offense as "the mundane act of theft by opportunity." Her current conviction was of first degree burglary, a "serious offense" under section 1192.7. Despite her purported efforts to make certain that she entered a residence at which no one was home, she had no assurance that would be the case. She still risked confronting a resident surprised by the entry. Such confrontations, apart from the fear

they cause the resident, present a situation rife with risk of a physical altercation.

Similarly, appellant's attempt to attribute her long record of recidivism to a long standing and serious substance abuse problem is unavailing. (*See People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 ["drug addition is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment"].) Furthermore, because of that longstanding problem, appellant's poverty and homelessness, her prospects upon release from prison are dim. This was borne out in the past, when she reoffended shortly after being released from prison.

Appellant's claim that she had a period of 12 years without a serious or violent offense is also unconvincing. During most of that time she was in prison for a March 1994 burglary conviction for which she was sentenced to 12 years in prison.

In conclusion, we cannot say that the trial court abused its very broad discretion in ruling that appellant was not outside the spirit of the three strikes law and denying her *Romero* motion.

D. Cruel and/or unusual punishment

1. Forfeiture[7]

The attorney general contends that appellant forfeited the claim that her sentence constituted cruel and/or unusual punishment by failing to raise it in the trial court. Appellant argues that her *Romero* motion preserved that claim because the *Romero* motion "developed facts relevant to [the cruel and unusual punishment issue]." We disagree with appellant.

The California Supreme Court has repeatedly held that constitutional objections, like other objections, must be raised in the trial court in order to preserve them for appeal. (*See, e.g. People v. Williams* (1997) 16 Cal.4th 153, 250 [forfeit of First, Eighth, and Fourteenth Amendments]; *see also People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8 [forfeit of claim of cruel and unusual punishment].) A *Romero* motion raises the claim that the defendant is outside of the spirit of the three strikes law. It does not assert that the sentence is unconstitutionally cruel and/or unusual. It does not require presentation to the trial

---

[7] While the People use the term "waiver" in reference to appellant's failure to preserve the claim that her sentence constituted cruel and unusual punishment because she did not raise it in the court below, the correct term which we use in this opinion is "'forfeiture.'" "'Waiver'" is the express relinquishment of a known right whereas "'forfeiture'" is the failure to object or to invoke a right. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.)

court of numerous factors germane to the constitutional claim, such as how the punishment compares with punishment for comparable offenses in California and with other jurisdictions. Without this information, the trial court would not have adequate information to make an informed ruling.

2. The merits

Even if not forfeited, we would reject this claim on the merits. "[I]n our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments. . . ." (*In re Lynch* (1972) 8 Cal.3d 410, 414 (*Lynch*).) "The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible." (*Id.* at p. 423.) "Reviewing courts, . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." (*Solem v. Helm* (1983) 463 U.S. 277, 290, fn. omitted; *see also Lynch, supra*, 8 Cal.3d at p. 414.) "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494 (*Martinez*).)

"Nevertheless, a sentence may violate article I, section 17, of the California Constitution if it is so disproportionate to the crime for which it is imposed that it 'shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1413, overruled on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547.) *Lynch* articulated the relevant factors in analyzing whether a punishment is cruel or unusual under the California Constitution; the nature of the offender and the offense, comparison of the punishment with the penalty for more serious crimes in the same jurisdiction, and comparison of the punishment to the penalty for the same offense in different jurisdictions. (*Lynch, supra*, 8 Cal.3d. at pp. 426-427.)

Similarly, under the federal Constitution punishment may be considered unconstitutionally excessive and in violation of the Eighth Amendment's prohibition against cruel and unusual punishment if it is "grossly out of proportion to the severity of [his] crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173; *Harmelin v. Michigan* (1991) 501 U.S. 957, 995.) The Eighth Amendment has a "'narrow proportionality principle'" which prohibits only extreme sentences that are grossly disproportionate to the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20-21 (*Ewing*).) The "disproportionality principle, the precise contours of which are unclear, [are] applicable only in the 'exceedingly rare' and 'extreme' case. . . ." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73 (*Andrade*).) We do not find the federal standard significantly different from

the California standard and, if anything, it appears subsumed within the *Lynch* analysis.

Appellant's challenge to her 40-year sentence is not one of those rare cases in which the Legislature has overstepped its bounds and imposed a penalty that is cruel and unusual. The sentence imposed on appellant, under the circumstances presented, does not appear to be substantially more disproportionate than the sentences imposed in *Andrade* or *Ewing*, the United States Supreme Court's most recent pronouncements on the subject. Appellant fails to compare and contrast the facts in those cases with those presented here.

In *Andrade*, the defendant, a heroin addict, was convicted of two counts of petty theft with a prior (§ 666), a "wobbler" offense. He stole videotapes with a total value of approximately $150 from two stores in order to purchase narcotics. (*Andrade, supra*, 538 U.S. at p. 67.) His prior strike convictions were for three counts of residential burglary. (*Id.* at p. 68.) He was sentenced to two consecutive terms of 25 years to life under the three strikes law. The United States Supreme Court held that the state appellate court's rejection of an Eighth Amendment challenge to the sentence did not contradict or unreasonably apply clearly established federal law within the meaning of title 28 United States Code section 2254(d). It found that the defendant's sentence was not grossly disproportionate. (*Andrade, supra*, at p. 77.)

In *Ewing*, the defendant was convicted of a "'wobbler'" grand theft, for stealing three golf clubs (*Ewing, supra*, 538 U.S. at p. 19) and was sentenced to 25 years to life under the three strikes law. His prior alleged strikes included three burglaries and a robbery. He also had convictions for several other theft offenses, not alleged as strikes. (*Id.* at pp. 18-19.) The United States Supreme Court stated that the defendant's "long history of felony recidivism" should be considered in weighing the gravity of the offense. (*Id.* at p. 29.) It held that the sentence did not violate the Eighth Amendment. (*Id.* at p. 30.)

Given the amorphous nature of the grossly disproportionate principle, its extremely limited application to only the most extreme cases, and the Supreme Court's conclusions in *Ewing* and *Andrade*, appellant's sentence and recidivist history falls squarely within the reach of those cases. Appellant's current offense was far more serious than either of the current offenses in *Andrade* or *Ewing*, and is a "serious offense" under section 1192.7. Nor is appellant's recidivist history so different from those defendants as to compel a different conclusion. Thus, federal authorities indicate that appellant's sentence is not so grossly disproportionate as to violate the Eighth Amendment.

Further, as discussed in part IIIC, *ante*, we find nothing in the nature of appellant and of the offense suggesting that the punishment is inordinate. Appellant's current offense, while not violent, presented a serious risk of violence. Her recidivist history

reflected significant criminal activity, including numerous burglaries. A good part of appellant's sentence is attributable not to punishment for the current charges, but to punishment for her recidivism. "Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824.) *People v. Cooper* stated that "[t]he imposition of a 25-year-to-life term for a recidivist offender . . . convicted of a nonviolent, nonserious felony but with at least 2 prior convictions for violent or serious felonies is not grossly disproportionate to the crime." (*Id.* at p. 825.) Here, appellant's current offense was not simply for any felony, but was for a statutorily defined serious felony.

Appellant argues that her punishment is excessive when compared to other offenses. In making this argument, she compares appellant's sentence with the 15-years-to-life sentence for second degree murder, the up to eight-year sentence for rape, and up to 11-year sentence for voluntary manslaughter. This is a comparison of apples to oranges. The sentences for the offenses she has selected to compare with appellant's sentence are for the commission of those offenses, without factoring in recidivism. When prior felony strikes are factored into the equation, appellant's sentence is not disproportionate.

Comparison of the three strikes law with recidivism statutes in other states also indicates that California's statute is not excessive. (*See People v.*

Martinez, supra, 71 Cal.App.4th at pp. 1513-1515, surveying three-strike-type statutes in some other states.) Louisiana and Mississippi provide for life without the possibility of parole for a third strike. (*People v. Martinez, supra*, at p. 1516; La. Rev. Stat. Ann. § 15:529.1, subd. A(b)(ii)C; Miss. Code Ann. § 99-19-83.) Delaware imposes life sentences on defendants convicted of specified felonies. (Del. Code Ann., tit. 11, § 4214.) West Virginia, like California, allows the third strike to be any felony, rather than a serious or violent felony. (W. Va. Code, 61-11-18(c).)

Appellant argues that among the numerous states with three-strike-type laws, California's is the most severe. Just because California's law is the most severe does not mean that it is grossly disproportionate to the penalties of other states. There will always be one state whose sentence is greater than the rest. That fact alone does not render the punishment disproportionate and cruel and unusual. Moreover, to the extent that California's punishment may be viewed as greater than all other states, it need not tailor its sentencing to be in lockstep with other jurisdictions. (*People v. Martinez, supra*, 71 Cal.App.4th at p. 1516.) We do not find California's law to be so out of line with other jurisdictions as to call into question its constitutionality.

DISPOSITION

The judgment is affirmed.

APPENDIX B

PEOPLE v. DAIRE (SOPHIA LORRAINE)

S169253

SUPREME COURT OF CALIFORNIA

2009 Cal. LEXIS 1207

January 28, 2009, Filed

JUDGES: George, C. J., was absent and did not participate.

OPINION

Petition for review denied. George, C. J., was absent and did not participate.

Supreme Court, U.S.
FILED
FEB 19 2009
OFFICE OF THE CLERK

No. 08-1327

IN THE

Supreme Court of the United States

LINDA HARRIS-BRUNSON,

Petitioner,

—v.—

JAMES JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

LINDA HARRIS
1000 Peachtree Industrial Boulevard
Suite 6-123
Suwanee, Georgia 30024
(678) 710-5625

Petitioner Pro Se

QUESTIONS PRESENTED

The questions presented are:

1. Did the trial judge err by not scheduling a hearing within a reasonable timeframe "as stated in the Order Transferring *Case Findings of Fact* in respect to jurisdiction Complaint For Grandparents' Visitation Rights"?

2. Did the trial judge err by stating in the Order Transferring *Conclusions of Law* "that neither the child nor the child's parents or any person acting as a parent has a significant connection with the state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships OR until it determines that neither the child nor the child's parents or any person acting as a parent resides in this state"?

3. Whether the Fourteenth Amendment's Due Process Clause is violated when a court did not order grandparent visitation and whether Petitioner was improperly and unfairly prejudiced by the admission of evidence presented.

4. Can this Court review issues about constitutional rights that the state court have never addressed or decided, and that are currently before a state trial court?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... v

PETITION FOR A WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT..... 3

A. The Trial Court Proceedings 9

B. The Court of Appeals of Georgia Court Decision 12

C. The Supreme Court of Georgia Decision..... 12

REASONS FOR GRANTING THE PETITION.... 12

A. The Order from the Superior Court Is Incorrect. The trial court erred in Finding are not factual. 15

PAGE

B. The states are deeply divided as to whether a fit Parent's fundamental Right Under the due process clause of the Fourteenth amendment requires that Grandparent seeking Court-Ordered Visitation Over The Parent's Objection Must Demonstrate That Visitation is necessary to avoid harm to the child 17

C. Twelve States Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child..... 18

D. Eleven States Do Not Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child..... 24

E. The Widespread Uncertainty Regarding The Circumstances Under Which A Court May Interfere With A Fit Parent's Constitutional Rights Requires This Court's Intervention 26

F. Protracted legal battles over grandparent visitation are unlikely to produce the sort of benefits that children need 27

CONCLUSION..... 36

PAGE

APPENDIX

The Supreme Court of Georgia

- Linda Harris-Brunson v. James Jenkins
(this case)..... 1a

Memorandum Decisions of District Court

- Linda Harris-Brunson v. James Jenkins
(this case)..... 2a

Judgment of Court of Appeals

- Linda Harris-Brunson v. James Jenkins
(this case)..... 5a

Order for Petition Intervenor's Complaint For Grandparents' Visitation Rights

- Linda Harris-Brunson v. James Jenkins
(this case)..... 7a

TABLE OF AUTHORITIES

Cases: PAGE

Blakely v. *Blakely*, 83 S.W.3d 537 (Mo. 2002) 25

Blixt v. *Blixt*, 774 N.E.2d 1052 (Mass. 2002) 18, 20

Brandon L. v. *Moats*, 551 S.E.2d 674 (W. Va. 2001) 8, 26

Brooks v. *Parkerson*, 454 S.E.2d 769 (Ga. 1995) 18, 28, 30, 32

Camburn v. *Smith*, 586 S.E.2d 565 (S.C. 2003) 8, 19, 22

Currey v. *Currey*, 650 N.W.2d 273 (S.D. 2002) 26

Dearborn v. *Deausault*, 808 N.E.2d 1253 (Mass. Ct. App. 2004)..... 20

DeRose v. *DeRose*, 666 N.W.2d 636 (Mich. 2003)..... 24, 27

Dodd v. *Burleson*, 932 So. 2d 912 (Ala. Civ. App. 2005) 27

Evans v. *McTaggart*, 88 P.3d 1078 (Alaska 2004)..... 25

PAGE

Galjour v. *Harris*, 795 So. 2d 350
(La. Ct. App. 2001)..... 27

Ginsberg v. New York, 390 U.S. 629
(1982) 31

Glidden v. Conley 820 A.2d 197
(Vt. 2003)..... 19

Hamit v. *Hamit*, 715 N.W.2d 512
(Neb. 2004) 26

Harrold v. *Collier*, 836 N.E.2d 1165
(Ohio 2005) 26

Hawk v. Hawk, 855 S.W. 2d 573, 580
(Tenn. 1993) 32

In re Adoption of C.A., 137 P.3d 318
(Colo. 2006) 25

In re Custody of Smith, 969 P.2d 21
(Wash. 1998) 22

In re Marriage of Harris, 96 P.3d 141
(Cal. 2004) 25

In re Marriage of Howard, 661 N.W.2d 183
(Iowa 2003).....18, 19, 20, 21

In re Parentage of C.A.M.A., 109 P.3d 405
(Wash. 2005) 18, 19

PAGE

In re Paternity of Roger D.H., 641 N.W.2d 440 (Wis. Ct. App. 2002)..... 27

In re R.A., 891 A.2d 564 (N.H. 2005)..... 18

In re: Suggs, 249 Ga. 365,367 (1982) 32

Linder v. *Linder*, 72 S.W.3d 841 (Ark. 2002) 18, 20

Koshiko v. *Hanning*, 897 A.2d 866 (Md. Ct. Spec. App.) cert. granted, 900 A.2d 751 (tbl.) (Md. 2006) 27

Lulay v. *Lulay*, 739 N.E.2d 521 (Ill. 2000) 23

McCune v. *Frey*, 783 N.E.2d 752 (Ind. App. 2003) 27

McGovern v. *McGovern*, 33 P.3d 506 (Ariz. Ct. App. 2001) 27

Merchant v. *Bussell*, 27 A.2d 816 (Me. 1942) 19

Mizrahi v. *Cannon*, 867 A.2d 490 (N.J. Super. Ct. App. Div. 2005) 22

Moriarty v. *Bradt*, 827 A.2d 203 (N.J. 2003)..... 18, 22

PAGE

Prince v. Massachusetts, 321 U.S. 158,164 (1944) 31

Rideout v. *Riendeau*, 761 A.2d 291 (Me. 2000) 19, 35

Ridenour v. *Ridenour*, 901 P.2d 770 (N.M. Ct. App. 1995) 27

Roth v. *Weston*, 789 A.2d 431 (Conn. 2002) 8, 18, 20

Santosky v. Kramer, 445 U.S. 745, 753 (1982) 30

Stacy v. *Ross*, 798 So. 2d 1275 (Miss. 2001) 19

State v. *Paillet*, 16 P.3d 962 (Kan. 2001) 25

Stanley v. Illinois, 406 U.S. 645,651-652 (1972) 32

Thomas v. *Nichols-Jones*, 2006 Del. Lexis 515 (Del. 2006) 25

Troxel v. *Granville*, 530 U.S. 57 (2000) ..... *passim*

Vibbert v. *Vibbert*, 144 S.W.3d 292 (Ky. Ct. App. 2004) 27

PAGE

Wickham v. *Byrne*, 769 N.E.2d 1 (Ill. 2002) 23

Williams v. *Williams*, 501 S.E.2d 417 (Va. 1998) 18, 21

Statutes and Other Legislative Materials

Ga. Code Ann., Sec. 19-7-1 32

Ga. Code Ann., Sec. 19-7-3 ..... 28, 30

O.C.G.A. § 19-9-41(7) 15

O.C.G.A. § 19-9-44 15

O.C.G.A. § 19-9-47 15

O.C.G.A. § 19-9-60 15

O.C.G.A. § 19-9-61(a)(1) 15

O.C.G.A. § 19-9-65(a) 15

Rule 4.4(D) (1) 12

750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006) 19, 24

Ill. H. Trans., H. 93-110, Reg. Sess. (2004) 23

PAGE

Ill. S. Trans., S. 93-109, Reg. Sess. (2004) 24

Mich. Comp. Laws § 722.27b(4)(b) (2006) 19, 23

Mich. S. Fiscal Agency B. Analysis, S. 92, Reg. Sess. (2005)..... 24

Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006) 19, 22

H. 79, Tex. B. Analysis, H.B. 261, Reg. Sess. (Tex. 2005) 23

U.S. Const. amend. XIV 2

Other Authorities:

Child Custody & Visitation Law and Practice, Sec. 16.12[3] n..38 (1982 & 1994 Supp.) 33

Meredith Ruston, "Splitting the Baby" in *Troxel v. Granville*, 14 J. Contemp. Legal Issues 347 (2003) 26

Gerald Nissenbaum and Stephen Maloney, "Grandparent Visitation Rights are not Ironclad" (1996) 29

PETITION FOR A WRIT OF CERTIORARI

Petitioner Linda Harris, respectfully petition for a writ of certiorari to review the decision and order of the Superior Court of Gwinnett County State of Georgia in this case.

OPINIONS BELOW

The decision of The Supreme Court of Georgia, S08C1612, entered its judgment on September 22, 2009 is attached to the Appendix as **"1A"**. The decision of The Court of Appeals, A08D0339, entered its judgment on May 15, 2008 is attached to the Appendix as **"5A"**. The Superior Court of Gwinnett County State of Georgia, *Harris-Brunson v. Jenkins*, et al, 06-A-06158-2, entered its judgment on March 19, 2008 is attached to the Appendix as **"2A"**.

STATEMENT OF JURISDICTION

The Supreme Court of Georgia entered its judgment on September 22, 2008. Petitioner shows that the jurisdiction is properly in this Court. Jurisdiction of the United States Supreme Court pursuant to Supreme Court Rule 10 (hereinafter, "Rule 10").

Rule 10 provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons and special and important reasons therefore." Jurisdiction of this Court is invoked under rule 10(c) which provides that review should be granted when the court below "has

not been, but should be settled by this Court..." Supreme Court Rule 10(c).

This Court has the inherent power to act upon a petition for certiorari and render a fair decision; however, generally a party petitioning for a writ must be able to demonstrate that:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals . . .
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; [or]
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10. The Rule 10 criteria have not been met.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

If a parent of a married child is deceased, the grandparents of the deceased child may be granted reasonable visitation rights, by the court that would be in the best interest of the children. The court shall consider the amount of personal contact between the grandparents prior to the application.

STATEMENT

This is one of the most important cases ever to reach this Court, and resolution of the questions presented here will largely determine the future of other families in the future.

The Petitioner Linda Harris is the maternal aunt of Jaylen and Javon Jenkins and twin sister of Lynn Jenkins and is seeking grandparent visitation rights for her parents James Harris Jr. and Margaret J. Harris.

Six years after the U.S. Supreme Court curbed grandparents rights in child-visitation disputes. In 2006 there were three court rulings by state supreme courts suggest that those who go to court seeking more time with their grandchildren are gaining ground.

The rulings in Pennsylvania, Utah, and Colorado in favor of grandparents who sought visitation despite the objections of a child's parent

indicate that courts increasingly are sympathizing with grandparents – particularly in cases involving the death of a parent or another family tragedy.

State judges generally were inclined to deny grandparents' petitions for visitation in the years after the ruling. However, as many states revisited their laws and grandparents' claims have risen to state high courts, it has become clear that grandparents can win visitation over a parent's objection in special circumstances, such as the death of the other parent.

In each of the cases, the surviving parent's fitness to care for the child was not in question. Yet the courts rejected arguments from the parents that they should control visitation and generally focused on the "best interests" of the grandchild.

In a Pennsylvania case involving an 11-year-old boy whose mother died of cancer, the state's Supreme Court ruled August 22, 2006 that the boy's father could not limit the maternal grandmother's visits to one day a month. The father's lawyer had argued that when a parent has not been found to be unfit, judges should not interfere with visitation limits unless a grandparent shows the limits would harm the child.

The Pennsylvania case revolved around Fausey, and whose mother, Stephanie, died in May 2002 of cancer. Kaelen's father, Shane, then "abruptly denied" the grandmother contact with Kaelen, according to the court. In rejecting Fausey's appeal, the state high court note that "grandparents have assumed increased roles in their grandchildren's lives, and our

cumulative experience demonstrates the ... benefits of ... intergenerational ties." The court also emphasized that Pennsylvania's visitation rights to grandparents whose child had died.

In a Utah case involving a 10-year-old girl who lived with her maternal grandparents after her mother died suddenly of an illness, the state Supreme Court upheld on August 25, 2006 a statute that allowed continued grandparent visitation. The court rejected a claim by the girl's father, who said the law violated his right to make decisions on behalf of his child.

In a Colorado case involving a boy who lost both his parents by age 5 and was adopted by a maternal aunt and uncle, the state's high court ruled June 26, 2006 that paternal grandparents could make a case for visitation even though they could not prove that denying visitation would harm the child. Colorado's Supreme Court reversed a lower court's ruling that required a grandparent to prove a parent's restriction "poses actual or threatened emotional harm to the child."

On October 11, 2005 The Ohio Supreme Court sided with maternal grandparents who wanted to visit there granddaughter, but were challenged by the girl's father. The Ohio law says that in cases where a parent of an unmarried minor dies, courts may grant grandparents and other relatives of the deceased parent visitation rights if those visits are deemed "in the best interest" of the child.

Each of the fifty States allows grandparents to seek court-ordered visitation with their grandchildren and thereby obtain judicial review of even a fit parent's decision to deny or limit visitation. See App., *infra*, 87a-108a. State courts of last resort are deeply divided as to whether a fit parent's federal constitutional right to make decisions regarding the care, custody, and control of his or her child requires that a grandparent demonstrate actual or potential harm to the child before a court may order custody or visitation over the parent's objection.

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), seven Justices recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *id.* at 68 (plurality opinion); see also *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). Justice O'Connor's plurality opinion—joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer—concluded that the State of Washington's Grandparent Visitation Statute was unconstitutional as applied to override a fit mother's decision to limit her daughter's paternal grandparents to monthly visits with the child following the father's suicide. *Id.* at 60-61, 73. The plurality noted the "sweeping breadth" of the Washington statute, *id.* at 73, and the failure of the Washington courts to accord "special weight" to the mother's decision and to apply "the traditional presumption that a fit parent will act in the best interest of his or her child," *id.* at 69. The plurality expressly left unanswered "whether the Due Process Clause requires all nonparental visitation statutes to

include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73.

Justice Souter concurred in the judgment. He reasoned that the Washington statute was facially unconstitutional because it authorized "'any person' at 'any time' to petition and receive visitation rights subject only to a free-ranging best-interests-of-the-child standard." *Troxel*, 530 U.S. at 76-77. Justice Thomas also concurred in the judgment, agreeing that "this Court's recognition of a fundamental right of parents to direct the upbringing of their child resolves this case." *Id.* at 80. Justice Thomas explained that strict scrutiny should apply to the custody order, concluding that "Washington lacks even a legitimate state interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Ibid.*[1]

The federal constitutional question left unanswered by *Troxel* continues to divide the States.

---

[1] Justices Stevens, Scalia, and Kennedy dissented in separate opinions. Noting that the Washington Supreme Court had found the state statute facially unconstitutional, Justice Stevens would have remanded for further review on the ground that the statute could have a "plainly legitimate sweep" despite applying to "any person" petitioning at "any time" and not requiring a showing of actual or potential harm in every case. *Troxel*, 530 U.S. at 85. Justice Kennedy dissented along similar lines, writing that he would remand for further review the state court's facial invalidation of state law because the best-interests-of-the-child standard might be appropriate in some third-party visitation cases. *Id.* at 94. Justice Scalia argued that the right of parents to direct the upbringing of their children is an unenumerated right not enforceable by "[j]udicial vindication." *Id.* at 91-92.

As detailed below (*infra* pp. 11-21), twelve States prohibit courts from ordering grandparent visitation absent a showing of actual or imminent emotional or physical harm to the health or welfare of the child, whereas eleven States permit court-ordered custody or visitation, over a fit parent's objection, without requiring such a showing. See also App., *infra*, 87a-110a.

That conflict has important implications for a fit parent's fundamental right to make childrearing decisions. In jurisdictions where the Due Process Clause is read to require a showing of harm, the parent-child relationship remains free from state interference unless a court is satisfied that intervention is necessary because "the parent's decision regarding visitation will cause the child to suffer real and substantial emotional harm." *Roth* v. *Weston*, 789 A.2d 431, 445 (Conn. 2002). In those States, "[t]he fact that a child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision." *Camburn* v. *Smith*, 586 S.E.2d 565, 579 (S.C. 2003).

In States where grandparents need not demonstrate any risk of harm to the child to gain court-ordered custody or visitation, a judge may override the parent's presumptively valid decision whenever the court disagrees with the parent's decision and concludes that additional contact with a grandparent would be in the child's "best interests." See, *e.g. Brandon L.* v. *Moats*, 551 S.E.2d 674, 687 (W. Va. 2001) (upholding a visitation order "in the best

interest of the children and [that] will not substantially interfere with the parent-child relationship"). In stark contrast to the "harm to the child" standard, the "best interests" standard sets a relatively low and notoriously vague bar. See *Troxel*, 530 U.S. at 75 (Souter, J., concurring) (criticizing "a free-ranging best-interests-of-the-child standard"); *id* at 101 (Kennedy, J., dissenting) (noting criticism of the best interests standard as indeterminate)."

In the decision below, the Georgia Supreme Court did not require a showing of actual or potential harm to the child before ordering, over the fit parent's objection, that a grandparent was entitled to take overnight custody of a child for one weekend a month and one week each summer. App., *infra*, at 25a-26a. While recognizing that a number of its sister States hold that the Due Process Clause requires such a showing, *id.* at 22a-23a & n.21, the Georgia Supreme Court noted that the *Troxel* Court "refused to determine" the question, *id.* at 22a, and therefore held that the federal Constitution did not require a grandparent to demonstrate that court-ordered partial custody is necessary to avoid harm to the child."

A. The Trial Court Proceedings

James and Lynn Jenkins were married on August 1998. In 2003, they sought reconciliation in their marriage by attending therapy sessions. In 2003 Lynn Jenkins was informed that she had cancer, and on 2004 she moved to the State of Georgia to seek "chemo-therapy treatment" there on account of the better weather.

A two year custody battle then ensued, and finally Georgia was designated the children's home state and the trial judge found by written order filed on September 5, 2006 that "Georgia was the home state of the children on the date of the commencement of the hearing."

Jaylen and Javon Jenkins were the only two children of James and Lynn Jenkins. Jaylen was born on October 18, 1998 and Javon on May 16, 2000 and lived with their mother and grandmother, Margaret Harris for a period of time until their mother Lynn Jenkins died of cancer on June 17, 2006 at the Atlanta Medical Center in Atlanta, Georgia.

The children were attending schools in Georgia. Javon attended Riverside Elementary School (2005-2006) and Jaylen attended B.B. Harris Elementary School (2004 -- 2006). Last date of school attendance was September 5, 2006. Jaylen attended B.B. Harris as a special needs student. From a baby he had hearing and speech problems and needed help with his speech. He had to get tubes in his ears. Petitioner was then taking care of the children until September 5, 2006.

On June 26, 2006, the Petitioner filed a Motion For Expedited Hearing and a Complaint for Determination of Child Custody Civil Action in The Superior Court of Gwinnett County, State of Georgia.

On August 5, 2006, following an off-the-record conference, with the trial judge and Mr. Dougherty, the Respondent's out-of-state counsel regarding

custody the Petitioner nor my attorney where not presented for the conference call. After that conference call, the trial judge issued temporary custody to the Respondent and granted unsupervised custody of Jaylen and Javon without any contact to the grandparents. Petitioner objected and was denied.

The Petitioner filed a motion to reconsider which the trial judge has never considered. Petitioner explained to the court her concerns regarding Respondent's unsupervised visitation, were based, in part, on past instances and concerns about the level of supervision and again the trial judge showed no concerned.

That afternoon the trial judge moved the case from September 13, 2006 to September 5, 2006 and told my attorney that the children must be at the hearing. We later found out the trial judge office was in direct contact with the Respondent's out-of-state attorney without the Petitioner knowledge.

The Respondent's lawyer stated that "his client was very upset because he said he could not come back because he had to work and he needs to get back to work". A faxed confirmation was also sent to the Petitioner's attorney confirming these facts. On September 1, 2006 an Order Scheduling Hearing was issued by trial judge. The Respondent's out-of-state attorney then calls the trial judge directly and states his client cannot jeopardize his position by coming back to Georgia the trial judge allows this behavior and again ignores the law and allows him to sends numerous of letters and not follow proper procedures.

Rule 4.4(D) (1) of the Uniform Superior Court Rules states: "An eligible Domestic Lawyer seeking to appear in a proceeding in this state as counsel *pro hac* vice shall file a verified application with the Court where litigation is filed. The application shall be served on all parties who have appeared in the case and the Office of General Counsel of the State Bar of Georgia. The application shall include proof of service...." The United States District Court, Northern District of Georgia *never* issued an Order of Admission to Mr. Dougherty granting him *pro hac vice*.

B. The Court of Appeals of The State of Georgia Court Decision

Petitioner timely appealed the trial court's order, continued to argue but was denied her due process.

C. The Supreme Court of The State of Georgia Court Decision

This case turns on the question left unanswered The Supreme Court of Georgia. The Petitioner petitioned The Supreme Court of Georgia and was denied on September 22, 2008.

REASONS FOR GRANTING THE PETITION

The health and welfare of the children will be harmed unless such visitation is granted because the relationship between the grandparents and the children was well established and the absence of the relationship will be detrimental to the children's psychological and emotional well being.

Grandparents provide a stabilizing force in times of family crises. Research indicates that grandparents contribute to child development by...; socializing with grandchildren; giving financial and emotional support; passing history, values and traditions to grandchildren.

Relations with grandparents add qualitative and quantitative dimensions to the pool of adult role models available to children. Researchers have found that the unconditional love that grandparents bestow upon grandchildren, aids in their self-esteem and efficacy. The best interest of the children will be served by such visitation because it is in their best interest to have a continuing and nurturing relationship with their grandparents.

The children have had an abiding and a very close relationship with their grandparents throughout their life. The grandparents missed them because they spent quality time with Jaylen and Javon while growing up and would like to continue the loving caring environment that the children were accustomed too because of their deep love for them.

In behalf of Jaylen and Javon, they were taught Bible stories that would enhance their thinking and build strong character. Some memorable times spent with them was playing games, saying their prayers at night and their listening to the night-night songs for them to have a pleasant sleep. Their beds were surrounded by stuff animals and some toys. They enjoyed playing airplane, going to the park, riding their bikes, playing with JJ the dog and many more

outdoors activities. Their teachers loved them and they had many young friends.

Besides losing their Mother in death they lost others too such as their great grandmother Harris they visited in California and their great grandmother Bumbry, Jaylen was a baby when she died. They also lost their great grandfather Harris and their Aunt Marilyn Cotman (who both have passed away without them knowing).

They loved visiting there grandfather Harris, great grandfather Harris, and loving family (Uncles, Aunts & cousins) spending quality time with family such as, playing in the yard, riding the train, going on a boat ride, talking and bonding with family.

Jaylen and Javon were taught to show love, respect and show kindness to people Our family would love to bond with them and would like to continue a loving relationship with them because of our deep love for them. We also would like as a family for the court to show mercy and compassion for our great lost of seeing Jaylen and Javon.

Petitioner asked trial court to reconsider its earlier denial of petitioner's plea of jurisdiction in light of new evidence. However, the trial court declined to do, issuing its "Temporary Order" to Respondent on September 5, 2006. The trial court never ruled on Intervenor's Conplaint For Grandparent's Visitation Rights is attached to the Appendix as **"7A"** as stated in the Order Transferring Case Findings of Fact Order.

When the trial court released its decision awarding temporary custody of Jaylen and Javon to their father, it also should have included in its judgment entry an order for grandparents visitation rights to the grandparents within its judgment of entry.

A. The Order from the Superior Court is Incorrect. The trial court erred in finding are not factual.

A court of this state has the jurisdiction to make an initial custody determination if this state was the home state of the children at the time of commencement of the action or was the home state of the children of the children within six month before the commencement of the proceeding. *O.C.G.A. § 19-9-61(a)(1)*. As it applies to this case, the "home state" is the state in which a child lived with a parent .... For at least six consecutive months immediately before the commencement of a child custody proceeding ... A period of temporary absence of [the child or part] is part of the period" *O.C.G.A. § 19-9-41(7)*. "A court of t his state shall treat a foreign country as if it were a state of the United States for the purpose of applying *O.C.G.A. § 19-9-60 et seq*.]. *O.C.G.A. § 19-9-44*.

Petitioner complained during the hearing, that the trial court could not properly proceed with a determination of child custody in this case unless the maternal grandparents had been given notice and opportunity to be heard in accordance with the standards of *O.C.G.A. § 19-9-47*. There is no evidence in the record of any attempts that this has been done.

Under *O.C.G.A. § 19-9-65(a)*, "[b]before a child custody determination is made under this article, notice and an opportunity to be heard in accordance with the standards of *O.C.G.A. § 19-9-47*, must be given to ... any person having physical custody of the child," "'Physical custody' means the physical care and supervision of a child" *O.C.G.A. § 19-9-41(7)*.

As set forth above, the child's maternal grandmother and maternal aunt resided in Georgia. They had been providing "physical care and supervision" of the parties' child in the six months prior to the commencement of this proceeding on September 6, 2006. Service of the process upon the children's maternal grandparents is an absolute prerequisite to jurisdiction of an initial custody determination of the proceeding. We are truly disadvantage ones. Our hearts are broken and in pain and distress.

Even though the Respondent is the rightful parent and we respect him as parent. The Respondent cannot denied or disallow grandparents visitations, shutting off grandparents access significantly impairs a child's physical health and emotional well-being and under the law it's not fair.

B. The States Are Deeply Divided As To Whether A Fit Parent's fundamental Right Under the Due Process Clause Of The Fourteenth Amendment Requires That A Grandparent Seeking Court-Ordered Visitation Over The Parent's Objection Must Demonstrate That Visitation Is Necessary To Avoid Harm To The Child

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), a majority of this Court recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *id.* at 65 (plurality opinion); see also *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). A plurality of the Court in *Troxel* determined that the Washington Grandparent Visitation Statute was unconstitutional as applied where a court awarded visitation rights to a child's paternal grandparents over the fit mother's objection. *Id.* at 75. Justice O'Connor, writing for the plurality, took issue with the Washington trial court's failure to accord "special weight" to the mother's "determination of her daughter's best interest," and the court's failure to apply "the traditional presumption that a fit parent will act in the best interest of his or her child." *Troxel*, 530 U.S. at 69."

Justice O'Connor emphasized that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73. Justice

Souter and Justice Thomas wrote separate opinions concurring in the judgment. See *supra*, p. 3. The States are deeply divided on the question expressly left unanswered by the *Troxel* plurality: "whether the Due Process Clause requires" that all grandparent visitation statutes must "include a showing of harm or potential harm as a condition precedent to granting visitation." *Troxel*, 530 U.S. at 73. Nine states courts of last resort have answered that question in the affirmative, and three more have established the same rule by statute in response to *Troxel*. See *infra*, pp. 12-17. Eleven States have reached the opposite conclusion. See *infra*, pp. 18-19.

C. Twelve States Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child

Twelve States prohibit court-ordered visitation over a fit parent's objection absent a showing that denial of visitation would result in actual or potential harm to the child. In nine of those jurisdictions, the highest court of the State has interpreted the Fourteenth Amendment's Due Process Clause to require harm as a threshold showing, without which court ordered visitation is impermissible. *Linder* v. *Linder*, 72 S.W.3d 841 (Ark. 2002); *Roth* v. *Weston*, 789 A.2d 431 (Conn. 2002); *Brooks* v. *Parkerson*, 454 S.E.2d 769 (Ga.1995); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *Blixt* v. *Blixt*, 774 N.E.2d 1052 (Mass. 2002); *In re R.A.*, 891 A.2d 564 (N.H. 2005); *Moriarty* v. *Bradt*, 827 A.2d 203 (N.J. 2003); *Williams* v. *Williams*, 501 S.E.2d 417 (Va. 1998); *In re*

Parentage of C.A.M.A., 109 P.3d 405 (Wash. 13 2005).[2] At least three States, in response to *Troxel*, have imposed a harm-based standard by statute to remedy federal constitutional infirmities in their respective laws. See 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006); Mich. Comp. Laws § 722.27b(4)(b) (2006); Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006).

The highest courts in those states have held that any lesser standard—requiring, for example, that the grandparent demonstrate merely that visitation would be in the best interests of the child—would afford inadequate "special weight" to the fit parent's determination of what is best for the child. See, *e.g.*, *Howard*, 661 N.W.2d at 192 ("There is nothing in [the

---

[2] In at least four other States, including Maine, Mississippi, South Carolina, and Vermont, courts have declined to declare potential harm to the child to be the *sole* justification for state intervention, but they have held that only sufficiently "compelling" or "urgent" circumstances, such as harm to the child, will overcome the presumption in favor of the fit parent. *Rideout* v. *Riendeau*, 761 A.2d 291, 301 (Me. 2000) ("The natural right of a parent to the care and control of a child should be limited only for the most urgent reasons.") (quoting *Merchant* v. *Bussell*, 27 A.2d 816, 818 (Me. 1942)); *Stacy* v. *Ross*, 798 So. 2d 1275 (Miss. 2001) ("[F]orced, extensive, unsupervised visitation cannot be ordered absent compelling circumstances which suggest something near unfitness of the custodial parents."); *Camburn* v. *Smith*, 586 S.E.2d 565, 579 (S.C. 2003). ("The presumption that a fit parent's decision is in the best interest of the child may be overcome only by showing compelling circumstances, such as significant harm to the child, if visitation is not granted.") (emphasis add); *Glidden v. Conley*, 820 A.2d 197 (Vt.203) holding that a mere "best interests" standard does not survive Troxel and requiring "evidence of compelling circumstances to justify judicial interference with the parent's visitation decision").

best interest standard] * * * that mandates the judge to give special weight to the parents' decision.").[3] Less compelling circumstances, those courts have explained, cannot justify "state intrusion on the [fit] parent's fundamental right" to make independent childrearing decisions. *Linder*, 72 S.W.3d at 858; see also *Howard*, 661 N.W.2d at 188. The Connecticut Supreme Court, for example, determined that "the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody [of the child] * * * namely, that the child is neglected, uncared for or dependent as those terms have been defined [by state statute]." *Roth*, 789 A.2d at 445 (internal quotation marks omitted). The Massachusetts Supreme Judicial Court similarly held that grandparents seeking visitation must "allege and prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare." *Blixt*, 774 N.E.2d at 1060.[4] The Virginia Supreme Court has

---

[3] The Iowa Supreme Court acknowledged that harm may result "[w]hen a grandparent has established a substantial relationship with a grandchild" and that emotional bond is severed, but held that the harm must be "beyond that derived from the loss of a helpful, beneficial influence of grandparents." *Howard*, 661 N.W.2d at 191. The court suggested that a "substantial relationship" would be that "akin to a parental relationship." *Ibid.*

[4] The Massachusetts court suggested that disturbing a "child's preexisting relationship with a nonbiological parent" might itself constitute harm, *Blixt* 774 N.E.2d at 1060, but state appellate courtshave applied that holding to define more precisely the circumstances under which children are harmed, see, e.g., *Dearborn v. Deausault*, 808 N.E.2d 1253, 1256 (Mass. Ct. App. 2004) (holding that a relationship in which a grandparent saw a

even specified that harm to the health, "child's health or welfare" must be actual and not merely potential or likely. *Williams*, 501 S.E.2d at 418.

Those jurisdictions reject the notion that judicial intervention into a fit parent's childrearing decisions may be justified where a grandparent demonstrates merely that court-ordered visitation would be in the child's best interests. See, e.g., *Howard*, 661 N.W.2d at 192 ("The best interest standard is a doctrine that embraces the interests of children, and we have never interpreted it to protect the fundamental parenting interest or to provide a presumption for fit parents."). As the South Carolina Supreme Court reasoned: "The fact that a child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision." *Camburn*, 586 S.E.2d at 568. That is, proof that visitation would satisfy a judge's opinion of a child's "best interests" cannot overcome the "presumption that a fit parent's decision is in the best interest of the child." *Ibid.*

The New Jersey Supreme Court similarly held that a "best interests" standard fails to respect a parent's due process rights because "the avoidance of harm to the child" is "the only state interest warranting invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation

---

child several times per month was "not the kind of relationship from which significant harm to the children may be inferred from disruption alone").

over the wishes of a fit parent." *Moriarty*, 827 A.2d at 222-223;8 see also *C.A.M.A.*, 109 P.3d at 410 ("'[T]he standard of best interest of the child is insufficient to serve as a compelling state interest overruling a parent's fundamental rights.'") (quoting *In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998)).[5] In sum, those state high courts have determined that only proof that grandparent visitation is truly necessary to avoid harm—and not merely to incrementally benefit the child's wellbeing—adequately protects parents' fundamental rights from state intervention. See *Camburn*, 586 S.E.2d at 568.

State legislatures also have read *Troxel* to require that grandparents prove that denial of visitation will result in harm to the child where a fit parent objects to visitation. The Texas Legislature amended the State's grandparent visitation statute to provide that courts may order visitation only where the grandparent "overcomes the presumption that a parent acts in the best interest of the parent's child by proving * * * that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being." Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006) (emphasis

---

[5]The New Jersey Supreme Court acknowledged that "the termination of a long-standing relationship between the grandparents and the child, with expert testimony assessing the effect of those circumstances, could form the basis for a finding of harm." *Moriarty*, 827 A.2d at 224. State appellate courts have subsequently focused on the need for evidence of actual physical, mental, or emotional suffering and have interpreted the standard set forth in *Moriarty* to require more than the "loss of potentially happy memories." *Mizrahi v. Cannon*, 867 A.2d 490, 498 (N.J. Super. Ct. App. Div. 2005).

added); see also H. 79, Tex. B. Analysis, H.B. 261, Reg. Sess. (Tex. 2005) (explaining that the bill "[i]ncorporates the holding in *Troxel v. Granville*, 530 US 57 (2000)"); Tex. Att'y Gen. Op. No. GA-0260, 2004 WL 2326558, at *11 (Oct. 13, 2004) (recommending that, "to avoid an unconstitutional application of the [Texas grandparent visitation] statute" following *Troxel*, courts must require grandparents to prove that "denial of access by the grandparent would significantly impair the child's physical health or emotional wellbeing").

Likewise, the Illinois legislature amended its visitation statute in the wake of *Troxel* to require that grandparents demonstrate harm to the child before courts may order visitation rights over the decision of a fit parent. The House sponsor of the bill noted that the State's previous visitation statute "was too lenient" and had been invalidated in a series of decisions by the Illinois Supreme Court in light of *Troxel*.[6] Ill. H. Trans., H. 93-110, Reg. Sess., at 80 (2004). The new statute was "written with [those] Supreme Court decision[s] in mind" and, accordingly, replaced the "best interest of the child" standard with a "harm to the child" standard. Ill. S. Trans., S. 93-109, Reg. Sess. (2004). The amended statute specifies

---

[6]Immediately following *Troxel*, the Supreme Court of Illinois sustained an as-applied challenge to the statutory provision that allowed grandparents to petition for court-ordered visitation over the objection of both parents. *Lulay Lulay*, 739 N.E.2d 521 (2000). In 2002, it held those statutory provisions *facially* unconstitutional because they failed to incorporate a presumption that fit parents acted in the best interests of their children. *Wickham* v. *Byrne*, 769 N.E.2d 1 (2002).

that "[t]he burden is on the [grandparent] * * * to prove that the parent's actions and decisions regarding visitation times are *harmful to the child's mental, physical, or emotional health*." 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006) (emphasis added).

The Michigan legislature also adopted a grandparent visitation statute containing a harm-based standard, Mich. Comp. Laws § 722.27b(4)(b) (2006), after the Michigan Supreme Court held the previous statute unconstitutional in the wake of *Troxel*. See *DeRose v. DeRose*, 666 N.W.2d 636 (Mich. 2003). The new statute codifies *Troxel*'s "presumption that fit parents act in the best interests of their children" by requiring that a grandparent prove that a parent's decision to deny visitation creates "a substantial risk of harm to the child." *Mich. S. Fiscal Agency B. Analysis*, S. 92, Reg. Sess. (2005) presenting the legislative history of the amended Child Custody Act).

D. Eleven States Do Not Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child

Pennsylvania joins the highest courts of ten other States that permit courts to order grandparent visitation even absent a judicial determination that visitation is necessary to avoid harm to the child. Those courts reject the proposition that the federal Due Process Clause precludes court-ordered visitation to grandparents unless the child has been, or is likely to be, harmed by the lack of visitation. Moreover, some of those courts have decided that

placing the burden on the grandparent to prove that visitation would be beneficial to the child sufficiently accounts for the "special weight" that *Troxel* requires be accorded to parental preferences. See, e.g., *Evans v. McTaggart*, 88 P.3d 1078, 1089 (Alaska 2004) ("[The] special weight [that] must be given to a fit parent's determination as to the desirability of visitation with [grandparents] * * * can be accomplished by imposing on the [grandparent] the burden of proving that visitation by the [grandparent] is in the best interests of the child and by requiring that this be established by clear and convincing evidence.").

The highest courts in these States consider only whether visitation is in the "best interests" of the child. The courts typically make that determination by resorting to commonlaw or statutory multi-factor tests that do not require a showing of harm to the child. See Evans, 88 P.3d at 1096 ("best interests" standard sufficiently accounts for the "special weight" that must be given to fit parents' decisions); *In re Marriage of Harris*, 96 P.3d 141, 154 (Cal. 2004) (upholding a "best interest" standard in light of *Troxel*); *In re Adoption of C.A.*, 137 P.3d 318, 325 (Colo. 2006) (upholding a statutory "best interests" standard, because "*Troxel* did not require a standard of significant or substantial emotional harm to the child"); *Thomas v. Nichols-Jones*, 2006 Del. Lexis 515, *4-*5 (Del. 2006) (upholding application of best interests standard in light of *Troxel* where grandparent bears the burden of proof); *State v. Paillet*, 16 P.3d 962, 971 (Kan. 2001) (*Troxel* did not "call[] into question" a statutory standard permitting court-ordered visitation where there has been no finding of potential harm to the child); *Blakely v.*

Blakely, 83 S.W.3d 537, 543 (Mo. 2002) (upholding a statutory "best interests" standard, because *Troxel* does not "require[] courts to find unconstitutional on its face any statute granting grandparents visitation in the absence of a finding that the lack of such visitation will cause the child harm"); *Hamit v. Hamit*, 715 N.W.2d 512, 528 (Neb. 2004) (the statutory "best interests" standard survives *Troxel*); *Harrold v. Collier*, 836 N.E.2d 1165, 1172 (Ohio 2005) (upholding a multi-factor statutory "best interest" test and denying that *Troxe*l requires a higher threshold showing); *Currey v. Currey*, 650 N.W.2d 273, 278-79 (S.D. 2002) (considering the effect of *Troxel* and applying a statutory "best interests" standard); *Brandon L. v. Moats*, 551 S.E.2d 674, 685 (W.Va. 2001) (upholding a statutory "best interests" standard in light of *Troxel*).

E. The Widespread Uncertainty Regarding The Circumstances Under Which A Court May Interfere With A Fit Parent's Constitutional Rights Requires This Court's Intervention

All fifty States have some kind of third-party visitation statute, and all continue to wrestle with the application of those statutes in light of *Troxel*. See App., *infra* at 87a-110a. The existing conflict shows no sign of abating, and "[t]he * * * years since *Troxel* have made abundantly clear that its narrow holding has done much to muddy the jurisprudential waters with regard to visitation." Meredith Ruston, "Splitting the Baby" in *Troxel v. Granville*, 14 J. Contemp. Legal Issues 347, 351 (2003). Indeed, in the wake of *Troxel*, twenty-eight state supreme courts have confronted whether the Fourteenth Amendment

requires that those statutes incorporate a harm threshold. See App., *infra*, at 87a-101a.[7]

The Supreme Court of Michigan agreed, remarking that, post-*Troxel*, "federal constitutional law in this area is now not as predictable as it was before." *DeRose*, 666 N.W.2d at 643. It falls to this Court to provide much-needed predictability by issuing a clear directive to the States as to what the Constitution requires. Absent this Court's guidance, parents, children, and grandparents seeking visitation will continue to bear the expense and disruption of continued litigation.

F. Protracted legal battles over grandparent visitation are unlikely to produce the sort of benefits that children need.

Georgia: Ga. Code Ann. § 19-7-3 gave grandparents the right to petition for visitation.

---

[7] Of those States whose highest courts have not ruled since *Troxel* as to whether the Fourteenth Amendment mandates a harm requirement, two have pre-*Troxel* precedent requiring a showing of harm. Eight States have no published case law squarely addressing the federal constitutional question. In another nine States, intermediate appellate courts are the highest authority to rule. See *Dodd* v. *Burleson*, 932 So.2d 912, 920 (Ala. Civ. App. 2005); *McGovern* v. *McGovern*, 33 P.3d 506, 511-512 (Ariz. Ct. App. 2001); *McCune* v. *Frey*, 783 N.E.2d 752, 756 (Ind. App. 2003); *Vibbert* v. *Vibbert*, 144 S.W.3d 292, 294-295 (Ky. Ct. App. 2004); *Galjour* v. *Harris*, 795 So. 2d 350, 358 (La. Ct. App. 2001); *Koshiko* v. *Hanning*, 897 A.2d 866, 882 (Md. Ct. Spec. App.) cert. granted, 900 A.2d 751 (tbl.) (Md. 2006); *Ridenour* v. *Ridenour*, 901 P.2d 770, 774 (N.M. Ct. App. 1995); *In re Paternity of Roger D.H.*, 641 N.W.2d 440, 445 (Wis. Ct. App. 2002).

Georgia's experience with its prior grandparent visitation statute is representative of what has happened in other states. In *Brooks v. Parkenson*, the child's maternal grandmother sought visitation under Ga. Code. Ann. Sec. 19-7-3, the 1988 version of Georgia statute. Visitation, denied by the trial court, had been opposed by both of the child's parents.

Pursuant to Sec. 19-7-3(a), grandparents had "the right to seek visitation of a minor grandchild in three ways: by filing an original action for visitation rights, by intervening in certain existing actions, including those where the custody of a minor child is in issue, or by proceeding where there has been an adoption in which the adopted child has been adopted by the child's blood relative or a stepparent." Sec. 3(c) also provided grandparent visitation "upon proof of special circumstances which make such visitation rights necessary to the best interests of the child."

On appeal, the Georgia Supreme Court considered whether the statute was constitutional. First, the court examined the interest that are protected by the federal Constitution. Then, the court looked at the extent to which a state may infringe upon an interest that is protected by the constitution. Last, the court had to determine if the state statute in question was within the permissible scope of infringement.

As a matter of well-established constitutional law, and whether married, separated or divorced parents have a constitutional right to privacy. Inherent in which is the right to raise their children without undue interference by the state: "The

fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."

Therefore, the state can infringe only upon a showing of compelling circumstances: that the health or welfare of the child is threatened.

Grandparent Visitation Rights are not Ironclad

Protracted legal battles over grandparent visitation are unlikely to produce the sort of benefits that children need. By Gerald L. Nissenbaum and Stephen C. Maloney[8]

With the passage and signing in April of a newly revised Georgia statute providing for grandparent visitation with children, all 50 states now attempt to provide some form of grandparent visitation with children.

Several states, such as Alaska, Arkansas, Colorado and now Georgia, give grandparents standing to seek visitation when one or both parents are deceased or when the parents are divorced or separated. Some states, such as California, Hawaii, Illinois, Nevada and Wisconsin, provide relatives and unrelated third parties with standing to seek visitation in situations in which a parent is deceased, the parents are divorced or separated or a custody action is pending. Grandparents and other third parties have been granted standing to pursue

---

[8] Article Abstracted

visitation when the child has resided with a grandparent or third party for a statutorily defined length of time, in such states as Minnesota, New Mexico, Pennsylvania and Wyoming.

In the past, many states, whether by statute or by case law, adopted the standard of "best interests of the child" to determine whether, and to what extent, grandparent visitation should occur.

Georgia's experience with its prior grandparent visitation statute is representative of what has happened in other states. In *Brooks v. Parkenson*, the child's maternal grandmother sought visitation under Ga. Code.Ann. Sec. 19-7-3, the 1988 version of Georgia statute. Visitation, denied by the trial court, had been opposed by both of the child's parents.

Pursuant to Sec. 19-7-3(a), grandparents had "the right to seek visitation of a minor grandchild in three ways: by filing an original action for visitation rights, by intervening in certain existing actions, including those where the custody of a minor child is in issue, or by proceeding where there has been an adoption in which the adopted child has been adopted by the child's blood relative or a stepparent." Sec. 3(c) also provide grandparent visitation "upon proof of special circumstances which make such visitation rights necessary to the best interests of the child."

Constitutional Issues

On appeal, the Georgia Supreme Court considered whether the statute was constitutional. First, the court examined the interests that are

protected by the federal Constitution. Then, the court looked at the extent to which a state may infringe upon an interest that is protected by the constitution. Last, the court had to determine if the state statute in question was within the permissible scope of infringement.

As a matter of well-established constitutional law, and whether married, separated or divorced parents have a constitutional right to privacy. Inherent in which is the right to raise their children without undue interference by the state: "The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[9] Therefore, the state can infringe only upon a showing of compelling circumstances: that the health or welfare of the child is threatened.

For example, laws preventing female children under the age of 18 from selling magazines[10] or limiting the availability of sex material to children have been held constitutional.[11] On the other hand, citing the due process and equal protection clauses of the Fourteen Amendment and the Ninth Amendment's right to privacy, the U.S. Supreme Court has declared unconstitutional laws that made

---

[9] *Santosky v. Kramer*, 445 U.S. 745, 753 (1982)

[10] *Prince v. Massachusetts*, 321 U.S. at 166

[11] *Ginsberg v. New York*, 390 U.S. 629 (1982)

the children of unwed father's wards of the state upon the death of the mother.[12]

Most state constitutions have similar protections. Rather than a mere preponderance of evidence, clear and convincing evidence of harm to the child is needed to support removal from the parent. In other words, any infringement of the right of parental control or removal can be sustained "only under the most compelling circumstances."[13] State infringement of these parental rights and interests is permissible only when the police power of the state must be used to protect a child's health and welfare or when the parental conduct would result in harm to the child.[14]

In Brooks, The Georgia Supreme Court held that the 1988 statute fell short "both in its apparent attempt to provide for a child's welfare and in its failure to require a showing of harm before visitation can be ordered. There is little empirical evidence that grandparent visitation promotes a grandchild's health and welfare. Even if such studies were available, grandparent visitation can be court-ordered only "over a parent's objections on a showing that failing to do so would be harmful to the child." In response to *Brooks,* the Georgia Legislature enacted a new law, Ga. Code Ann. Sec. 19-7-1, et seq. Now grandparent visitation rights may be sought in Georgia only when a least one of the child's parents had died or the parents' rights have been terminated. Grandparents who fit into

---

[12] *Stanley v. Illinois*, 406 U.S. 645,651-652 (1972)

[13] *In re: Suggs*, 249 Ga. 365,367 (1982)

[14] *Hawk v. Hawk*, 855 S.W. 2d 573, 580 (Tenn. 1993)

these limited circumstances can bring an original action or intervene in a seek visitation when the custody of a minor child is at issue, including cases in which there has been adoption by the child's blood relative or by a stepparent.

Taking helpful hints from its supreme court, the Georgia Legislature specified that there is no presumption in favor of grandparent visitation and that the law does not apply "where the parents of the minor child are not separated and the child is living with both of the parents." Regardless of the standards used in a jurisdiction, practical considerations influence the decision to pursue grandparent visitation.

First, counsel must advise the client that, apart from popular reference to "grandparent visitation statures" these laws are not intended or designed to provide emotional sustenance for the grandparent. The best interest of the grandparents is not the touchstone for application of these statutes.

It also is not enough to prove that grandparent visitation will enhance the child's emotional development. The grandparent must prove that, absent this visitation, the child will be harmed.[15]

These considerations appear to militate heavily against granting grandparent visitation in most circumstance. Even if there is a possibility that visitation would be granted, the grandparent must

---

[15] *Child Custody & Visitation Law and Practice, Sec. 16.12[3] n..38 (1982 & 1994 Supp.)*

consider whether the process of proving harm to the child in the absence of grandparent visitation will do more harm to the child than refraining from seeking visitation. As a practical matter, grandparents may find that offering financial contribution to the child's support, for instance, could be a better way to persuade the custodial parent to allow access to the children.

A protracted battle over grandparent visitation is unlikely to achieve the salutary benefits desired for the child. Accordingly, such litigation should be undertaken only when, absent such visitation, there can be a clear showing of harm to the child and when the likely benefit to the child can be clearly predicted to outweigh the emotional cost of the process. The "best interests" baseline is more appropriate in mediating custody disputes between those whose existing rights to custody are of equal strength, such as divorcing parents. As the plurality recognized in *Troxel*: [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Moreover, a standard that simply requires a grandparent to argue for a child's "best interests," without a threshold showing of potential harm, would invite litigation—a process that is almost never in the best interests of the child. As at least five Justices in *Troxel* agreed, "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right

of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'" *Troxel*, 530 U.S. at 75 (plurality opinion) (quoting id. at 101 (Kennedy, J., dissenting)).

Parties to a dispute over childrearing almost always feel they have the child's best interests in mind. A malleable "best interests" standard encourages any grandparents dissatisfied with the level of interaction they currently have with a child to file suit in the hope that the judge they draw will agree that the child's situation could be made better through mandatory visitation. See *Rideout v. Riendeau*, 761 A.2d 291, 296 n.5 (Me. 2000) ("Broad room for debate [under a subjective "best interests" standard] means a broad and unpredictable array of possible outcomes in any custody contest. That fact encourages prolonged and expensive litigation and 'strategic behaviors' of the parents, neither of which usually benefits children.")

In summary, our family would love to bond with Jaylen and Javon and to continue a loving relationship with them because of our deep love for them. We know they are still emotionally in pain in losing their Mother and we would like to ease some of their pain. Our family has been emotionally scarred and deeply in pain by not being able to have visitation rights to see them.

We would like to make this appeal on the basis of love. This is a sad story, because no one is a winner. I missed my sister so much, but at the end, she was a fighter, I am speaking on behalf of Jaylen and Javon, because at the end of this story they had no voice.

Please grant us the privilege of having a relationship with Jaylen and Javon.

CONCLUSION

For the above aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Linda Harris
1000 Peachtree Industrial Boulevard
Suite 6-123
Suwanee, GA 30024
(678) 710-5625
Petitioner Pro Se

April 20, 2009

APPENDIX

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE
ATLANTA

Date: September 22, 2008

Linda Harris-Brunson
5405 Spotted Fawn Court
Suwanee, GA 30024

Case No. S08C1612

LINDA HARRIS-BRUNSON

—v.—

JAMES JENKINS

COURT OF APPEALS CASE NO. A08D0339

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE
NO.: 06-A-06158-2

LINDA HARRIS-BRUNSON,
Plaintiff,

—VS—

JAMES JENKINS,
Defendant.

ORDER TRANSFERRING CASE

Findings of Fact

The Plaintiff in this case is the maternal aunt of the children and is a resident of Gwinnett County. The Defendant is the legal and biological father of the children and is a resident of the State of New York. The biological mother is deceased. On June 26, 2006, the Plaintiff filed a *Complaint For Determination of Child Custody* and *a Motion For Expedited Hearing*. The Court conducted a hearing in this matter on September 5, 2006, for the purpose of making a determination regarding the temporary custody of the minor children.

At the conclusion of this hearing, the Court awarded sole legal and physical custody of the minor children to the Defendant. The Defendant immediately returned to New York with the children following the September 5, 2006, hearing and has remained in New York with the children since that time. In January of 2007, the maternal grandparents, Jim Harris, Jr. and Margaret Harris, filed *a Complaint For Grandparents' Visitation Rights*. The Court thereafter conducted a hearing with respect to jurisdiction and the potential transfer of this case to new York. The Court has not issued a ruling in connection with the Complaint seeking visitation filed by the maternal grandparents.

Conclusions of Law

As stated above, this Court entered an Order Granting Temporary Custody to Defendant, in September of 2006, thereby making the "initial child custody determination" in this case as the term is defined in the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Pursuant to O.C.G.A. § 19-9-62(a), this Court maintains jurisdiction until it determines that neither the child nor the child's parents or any person acting as a parent has a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships OR until it determines that neither the child nor the child's parents or any person acting as a parent resides in this state.

In the present case, the Defendant is the only surviving parent of the minor children. He currently resides in the State of New York, and the children

have resided with him in that state since September of 2006. They have attended school in the State of New York for approximately a year and a half while living with their father and have formed friendships and relationships in that state during this time period. The most substantial evidence relating to their care, protection, training, and personal relationships is available in the State of New York. Furthermore, neither the children nor any parent or any person acting as a parent as defined by the UCCJEA presently live in this State. Based on the foregoing, jurisdiction is no longer proper in the State of Georgia.

To the extent that one could argue that this Court continues to maintain jurisdiction in this case, the Court declines to exercise its jurisdiction. Pursuant to O.C.G.A. § 19-9-67, the Court finds that this is an inconvenient forum under the circumstances and that the State of New York is a more appropriate forum in which to litigate this case. Based on the foregoing, it is proper to transfer this case to the Supreme Court of the State of New York, County of Bronx for disposition. The Court hereby orders said transfer and directs the Clerk of the Court to waive all costs of the transfer of this case.

SO ORDERED, this 19 day of March, 2008.

/S/ DEBRA TURNER
DEBRA TURNER, Judge
Superior Court of Gwinnett County

Copies to: Parties and/or attorneys of record

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, May 15, 2008

The Court of Appeals hereby passes the following order:

APPLICATION NO. A08D0339

LINDA HARRIS-BRUNSON

—v.—

JAMES JENKINS

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

96029

06A06158

[COURT OF APPEALS OF THE STATE OF GEORGIA SEAL]

Court of Appeals of the
State of Georgia

Clerk's Office, Atlanta

May 15, 2008

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ WILLIAM L. [ILLEGIBLE]

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

CIVIL ACTION
NO. 06A-06158-2

LINDA HARRIS-BRUNSON,
Plaintiff,

—v.—

JAMES JENKINS,
Defendant.

INTERVENOR'S COMPLAINT FOR GRANDPARENTS' VISITATION RIGHTS

The Intervenors, JIM HARRIS, JR. and MARGARET HARRIS, show that they are entitled to intervene as grandparents under O.C.G.A. § 19-7-3(b) in this case involving custody of children of a deceased parent, and states their claim for reasonable visitation rights as follows:

1.

The Plaintiff has signed an Acknowledgment of Service and is attached hereto as Exhibit "A". Defendant can be served at 1141 Tiffany Street, Apartment C, Bronx, New York, 10459.

2.

The minor children, Jaylen Jenkins, born October 18,1998 and Javon Jenkins, born May 16, 2000, are presently in the temporary physical legal custody of the Defendant, James Jenkins. The natural mother of the children is the child of the intervenors and is deceased, having died July 17, 2006. Temporary custody was granted to the Defendant on September 5, 2006.

3.

The health and welfare of the children will be harmed unless such visitation is granted because the relationship between the grandparents and the children is well established and the absence of the relationship will be detrimental to the children's emotional well being.

4.

The best interest of the children will be served by such visitation because it is in their best interest to have a continuing and nurturing relationship with their grandparents. The children have had an abiding relationship with their grandparents throughout their life, with their grandmother living with her daughter and the children in this case for a period of four (4) years. Prior to that, the grandmother lived in the apartment building next door to the children for the previous three (3) years.

5.

The grandfather intervenor has regularly visited with his grandchildren each year since their birth for a period of approximately two (2) weeks each

year. The grandfather has made a routine of almost nightly phone calls to the children since their birth to bid them goodnight.

6.

Multiple attempts have been made to reach the grandchildren to no avail. The temporary custodian of the children, the children's father, has not allowed any contact with the children in this case.

WHEREFORE, Intervenors pray:

(a) Their intervention be allowed;

(b) That they be granted reasonable visitation rights; and

(c) That they have such additional relief as the Court may consider equitable and appropriate.

Respectfully submitted this 19th day of the January, 2007.

/s/ JAN V. HINSON

Jan V. Hinson
Attorney for Plaintiff and Intervenors
Georgia Bar No: 356817

The Law Offices of Jan V. Hinson, P.C.
11330 Lakefield Drive
Building II, Suite 200
Duluth, Georgia 30097
770-814-4130